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In The

Supreme Court of the United States

October Term, 1993

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 130; AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406; ROBERT GRAVES, MARTIN N. LUDWIG, SR., DONALD J. LUDWIG, MELVIN BOE, ALCIDE BOUDREAUX, ALBERT CASTANEDA, EDWARD P. GEBHARDT, JR., FLORIAN J. LIZANA, III, WARREN L. MINTER, DALBERT PERRON, AND KENNETH SMITH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

DILLARD DEPARTMENT STORES, INC., AND D.H. HOLMES, LTD.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an employer who violates the WARN Act notice requirements only liable for the amount of wages the employees would have earned during the notice period even though that amount will not effectuate the policies of the Act, will create conflicts with other provisions in the Act, and is contrary to the express terms of the Act which mandate damages "for each day of violation"?

PARTIES BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit included Stephen J. Plescia and Alan A. Endermann in addition to the parties whose names appear in the caption. Although the United States, Liberty Mutual Insurance Company, and Federal Insurance Company were parties to the proceedings below, they have no interest in the outcome of this petition.

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CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 130; AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406; ROBERT GRAVES, MARTIN N. LUDWIG, SR., DONALD J. LUDWIG, MELVIN BOE, ALCIDE BOUDREAUX, ALBERT CASTANEDA, EDWARD P. GEBHARDT, JR., FLORIAN J. LIZANA, III, WARREN L. MINTER, DALBERT PERRON, AND KENNETH SMITH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Carpenters District Council of New Orleans and Vicinity; International Brotherhood of Electrical Workers Local 130; and International Union of Operating Engineers Local 406; Robert Graves, Martin N.

Ludwig, Sr., Donald J. Ludwig, Melvin Boe, Alcide Boudreaux, Albert Castaneda, Edward P. Gebhardt, Jr., Florian J. Lizana, III, Warren L. Minter, Dalbert Perron, and Kenneth Smith, on behalf of themselves and all others similarly situated, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit on the question presented.

I. OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 15 F.3d 1275, and is set forth in the Appendix. A-1. The opinion of the district court on the issue presented to this Court is reported at 778 F.Supp. 297 (E.D. La. 1991), and is set forth in the Appendix. A-39. Other opinions of the district court are reported at 778 F.Supp. 318 and 790 F.Supp. 663.

II. JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1994, and this petition was filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

III. STATEMENT OF STATUTE INVOLVED

The question presented for review involves Section 5(a)(1) of the Worker Adjustment and Retraining Notification Act ("WARN" or "Act"), 29 U.S.C. §2104(a)(1) (1988):

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for –

(A) back pay for each day of violation at a rate of compensation not less than the higher of –

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; . . .

* * *

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by –

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payout by the employer to the employee that is not required by any legal obligation;

* * *

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved

employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

* * *

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

IV. STATEMENT OF THE CASE

D.H. Holmes Co., Ltd. began courting Dillard Department Stores, Inc. in the fall of 1988, and that courtship culminated in their merger on May 9, 1989. A-42, 43. Dillard, aspiring to eliminate redundant corporate positions and to achieve an economy of scale, decided to effect layoffs immediately upon Holmes' shareholder approval of the merger. In deciding who to layoff and when, Dillard only considered the cost effectiveness of its actions, not the WARN Act or the futures of the 800 people whose jobs would be cut. Dillard admitted that although giving the full 60 days notice to employees being terminated would have been an added expense, the expenditure would not have been a significant one for the company.

On April 19, 1989, most employees of Holmes' corporate division were given notices explaining that they

would be terminated effective May 9, 1989, subject to Holmes' stockholders' approval of the merger with Dillard. A-43. A second notice of termination was sent in mid-April to certain "transitional employees" in the corporate and warehouse divisions notifying them that they would be laid off between May 9 and July 1, 1989. *Id.* Dillard distributed a third notice on May 12, 1989, after the merger had been approved, informing employees in Holmes' flagship retail store that it would be closed and they would be laid off between June 10 and July 8, 1989. *Id.* Of the approximately 800 former Holmes' employees who lost their jobs between May and August 1989, over 700 received insufficient notice under WARN, and were thus irremediably deprived of the opportunities that WARN, through its 60 days notice requirement, was intended to provide.

Recognizing that it had given insufficient notice, Dillard decided to pay employees as if a violation of the Act had been established. Dillard devised a formula whereby it would pay employees for the work days they presumably would have worked had a full 60 days notice been given; from this, it deducted severance and vacation pay that it owed the employees. A-44.

The named plaintiffs brought suit in the United States District Court for the Eastern District of Louisiana on behalf of themselves and others similarly situated, claiming violation of WARN. A-39, 40. The district court ruled, *inter alia*, that Dillard did not fit within any exemptions to the requirement that sixty days notice be given of a plant closing or mass layoff (A-53, 55, 59), that Dillard was not entitled to a credit for severance and vacation pay (A-61, 68, 69), and that damages under WARN were

due for each calendar day that notice was lacking rather than each work day. A-61, 63. The district court awarded the plaintiff class the total amount of $1,262,050.10 plus prejudgment interest. A-89, 90. The Fifth Circuit reversed the district court in part on the damage calculation issue, ruling that employees are entitled to damages only for those days they theoretically would have worked had they not been laid off before the expiration of the sixty day notice period. A-22, 37. The Fifth Circuit's ruling on this issue was made in emphatic rejection of the Third Circuit's recent ruling on the exact same issue. A-20. The parties have estimated that the total award will be reduced by over $350,000.00 pursuant to the Fifth Circuit's interpretation of WARN's damages provision.

V. REASONS FOR GRANTING THE WRIT

A. The conflict in the circuits created by the Fifth Circuit's ruling will cause employees similarly situated to be compensated differently, will foster costly litigation rather than voluntary compliance, and will encourage forum shopping.

This Court's resolution of the WARN damages provision is critical. The WARN Act became law on August 4, 1988, with an effective date of February 4, 1989. Although WARN is a relatively new statute, it is not an especially complicated one. Its purpose is to:

> provide[] protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of

> employment to seek and obtain alternative jobs, and if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

20 C.F.R. §639.1(a) (1993). The impact of WARN nationally cannot be understated. Even though WARN's notice requirements are implicated only when 50 or more employees are laid off, a recent study by the Comptroller General found that 3,078 and 3,891 plant closures or mass layoffs affecting 50 or more workers had occurred in 1990 and 1991 respectively, resulting in a loss of jobs to 1.4 million workers; moreover, that data did not include statistics from several large industrial states including California, Michigan and Ohio.[1] A study conducted by the United States Department of Labor found that between January 1987 and January 1992, 5.6 million workers lost jobs due to plant closings, company failures and other curtailments of employment.[2] Although the GAO Report concluded that employers were more likely to give workers advance notice after WARN was enacted than before,[3] it found that about half of the closures analyzed

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[1] *General Accounting Office, United States, Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting Its Goals: Report to Congressional Committees* 9 (1993) (hereinafter "GAO Report"). The GAO Report was mandated by WARN. 29 U.S.C. §2109 (1988).

[2] Gardner, *Recession Swells Court of Displaced Workers*, United States Department of Labor, 116 Monthly Labor Review 14 (June 1993).

[3] Between 11 and 18% of employers with closures or layoffs affecting large businesses gave workers at least 60 days notice in 1987 as compared to about 30% in 1990. GAO Report at 4.

did not have a WARN notice on file with the state dislocated workers unit, and that about a quarter of the notices on file gave workers less than the mandated 60 days notice and did not cite an exception to full notice. *Id.* at 4. Reasons cited by the GAO Report for this failure of compliance were employers' confusion concerning what the Act requires, and lack of an adequate enforcement mechanism.

These statistics are evidence that the dual interpretations of the WARN damages provision will have serious repercussions. They will impact every employer contemplating, and every worker affected by, a plant closing or mass layoff for WARN's damage provisions are mandatory, not discretionary.

The amount due to employees according to the Fifth Circuit interpretation varies significantly from the amount due under the Third Circuit interpretation. An employer who terminates its employees without sufficient notice will be liable in damages in an amount thirty percent less in the Fifth Circuit than in the Third Circuit. Because employers will likely apply the Fifth Circuit's damages formula, the burden will fall on employees to litigate the issue. For example, in *Joshlin v. Gannett River States Publishing Corporation*, 840 F.Supp. 660, 661 (E.D. Ark. 1993), an employer which admittedly failed to notify employees of their termination 60 days prior to the plant closing paid those employees for the time they would have worked during the 60 day period (some 42.5 days), and the employees brought suit seeking the full sixty

days pay for each affected employee.[4] The district court found the WARN damages provision to be "absolutely unambiguous on its face," and ordered the employer to pay employees for the calendar days of violation. 840 F.Supp. at 662. Because the issue is unsettled due to the Fifth Circuit's ruling, employees and employers in every circuit will repeat this scenario.

Not only will the split in the circuit courts on the WARN damage issue foster litigation rather than compliance, it will also encourage forum shopping. WARN provides that suits may be brought either where the violation occurred, or where the employer transacts business. 29 U.S.C. §2104(a)(5) (1988). In the present case, had the Fifth Circuit's interpretation of the WARN damages provisions been established at the time suit was filed, it is likely that suit would have been filed in Dillard's home state of Arkansas, where, per *Joshlin*, the plaintiffs could have been awarded a judgment greater by more than $350,000. This Court, simply by addressing the WARN damages issue now, will eliminate considerable unnecessary litigation, will avoid undue hardships and uncertainty which will be visited on employees by contentions over the proper damages to be paid and will promote a uniform application of the Act as Congress intended.

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[4] At the time *Joshlin* was decided, neither the Third nor Fifth Circuits had rendered their opinions, and there was no conflict in the circuits on this issue. 840 F.Supp. at 662-63.

B. The Fifth Circuit's ruling that damages pursuant to the WARN Act, 29 U.S.C. §2104(a)(1), are calculated on the basis of the number of work days within the statutory notice period, rather than the number of calendar days that notice was lacking, is in direct conflict with a ruling by the Third Circuit, the only other appellate court interpreting this statutory provision and conflicts with the express terms of the statute.

Within months of each other, two courts of appeal have rendered decisions interpreting the same damages provision of the WARN Act, each taking a position diametrically and irreconcilably opposed to the other. This conflict in the circuit courts will impact every employee and employer involved in a plant closing or mass layoff and blunt the effectiveness of the WARN Act unless this Court acts now to provide the correct interpretation of the Act's damages provision.

In *United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Company, Inc.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1060, *reh'g denied*, ___ U.S. ___, 114 S.Ct. 1585 (1994), the Third Circuit concluded that "under the plain language of the statute, a violating employer [i]s liable for 'back pay' for each of the calendar days of the violation." 5 F.3d at 42.[5] It determined that the

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[5] The only other reported case addressing the issue of WARN's damage calculation is *Joshlin v. Gannett River States Publishing Corporation*, 840 F.Supp. 660 (E.D. Ark. 1993) (holding employer liable for wages for each calendar day of violation). Two other reported cases applied the damage calculation without argument or discussion. *See United Electrical Workers v. Maxim*, 5 Indiv. Empl. Rts. Cases (BNA) 629 (D. Mass. 1990)

term "back pay" did not imply a lost earnings concept but instead was simply "a label to describe the daily rate of damages payable." *Id.* at 43. The Third Circuit refused to read the term "back pay" to the exclusion of the phrase "for each day of violation," and declined to accept that term as controlling evidence that Congress intended the WARN damages provision simply to provide make-whole relief.

This interpretation of the term "back pay" is compelling. WARN mandates that rather than looking ahead to what an employee would have earned during the violation period, a court must look back to what the employee has earned prior to the violation as the measure of damages. This differs from the make-whole relief of Title VII of the Civil Rights Act, 42 U.S.C. §2000(e) (1988), and the National Labor Relations Act ("NLRA"), 29 U.S.C. §160 (1988). *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination"); *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951) (NLRB's power under section 10(c) of the NLRA is remedial, not punitive). These statutes imbue the judiciary and the NLRB with a broad range of equitable powers to make employees whole, which include the authority to award back pay. *Albemarle Paper Co.*, 422 U.S. at 418.

(awarding 60 days pay); *Jones v. Kayser Roth Hosiery, Inc.*, 748 F.Supp. 1292 (E.D. Tenn. 1990), *modified*, 753 F.Supp. 218 (E.D. Tenn. 1990) (awarding wages for work days within violation period).

The make-whole goal of these statutes compels that when back pay is awarded – and it need not be – it is limited to the actual losses of the employees. It is axiomatic that under Title VII and the NLRA, the make-whole remedy requires that interim earnings be deducted from the gross back pay figure, and if an employee willfully fails to mitigate her damages, the back pay award is further reduced for such period of time or eliminated entirely. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-232 (1982); *Phelps Dodge v. NLRB*, 313 U.S. 177, 197-98 (1941); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-901 (1984). Conversely, because the back pay award under the NLRA and Title VII is a make-whole remedy, it includes intervening wage increases and decreases. *See Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 187-188 (1973); *Golay & Co. v. NLRB*, 447 F.2d 290, 294 (7th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 574-575 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Back pay is discretionary under both of these statutes. *See* 29 U.S.C. §160(c) (1988); 42 U.S.C. §2000e-5(g) (1988); *Bon Hennings Logging Co. v. NLRB*, 308 F.2d 548, 555 (9th Cir. 1962).

WARN provides a stark contrast. It does not take into account the wages an employee would have earned if she had stayed employed and therefore does not reflect the actual loss in wages to the employee, 29 U.S.C. §2104(a)(1)(A) (1988); it prohibits the courts from exercising any equitable relief such as enjoining a mass layoff or plant closing and makes the remedy at issue in the case at

bar the exclusive remedy for the violation of WARN;[6] it grants no authority to reinstate employees; it deprives the court of discretion to reduce damages under the Act;[7] and, most significantly, it prohibits any offset to damages including "interim" wages earned with another employer, except for certain amounts paid by the offending employer. *See* 29 U.S.C. §§2104(a)(2), 2107 (1988). That the employee's actual losses are not compensated, and that earnings from another employer do not reduce damages, completely vitiate the Fifth Circuit's conclusion that WARN provides so-called make-whole relief.[8]

Unlike a civil rights plaintiff (or an employee who is fired for her union activity) who receives back pay damages to compensate for services that would have been rendered absent the violation, a WARN plaintiff recovers damages to compensate for lack of notice and not loss of employment. *See United Paperworkers International Union*

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[6] *See* 29 U.S.C. §2104(b) (1988). Section 6 of WARN further demonstrates that WARN is not a make-whole statute. It allows employees to recover WARN damages that are unreduced by damages they may receive through causes of action arising under employment contracts or other statutes. 29 U.S.C. §2105 (1988).

[7] Damages may only be reduced if the employer proves that its acts or omissions were in good faith and it had reasonable grounds for believing it had not violated WARN. 29 U.S.C. §2104(a)(4) (1988).

[8] For example, affected employees covered by the International Union of Operating Engineers Local 406 collective bargaining agreement were due a pay raise on June 1, 1989, which was within the period of the violation. Yet the Fifth Circuit's "make-whole" remedy would not take this increase into account.

and Its Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51, 55 (2d Cir. 1993). When the term "back pay" is examined, not in isolation, but within the context of the entire Act and its purpose, it is clear that the Third Circuit's interpretation of the term, as a label to describe the rate of damages payable, is the only reasonable one. *See Deal v. United States*, ___ U.S. ___, 113 S.Ct. 1993, 1996 (1993) (meaning of word in statute should not be determined in isolation but from context in which it is used). The Fifth Circuit, by focusing entirely on the term "back pay" to the exclusion of the phrase "for each day of violation," violated a basic principle of statutory construction, which requires a court to interpret a statute so "that every word has some operative effect." *United States v. Nordic Village, Inc.*, ___ U.S. ___, ___, 112 S.Ct. 1011, 1015 (1992). As the trial court asserted, "[T]here is no rational explanation for inclusion in the Act of the phrase 'for each day of violation' if Congress intended to limit an employee's recovery only to wages he would have earned during the period of violation." A-63. If not read, as petitioners argue, to require damages for each calendar day, the statutory language "each day of violation" would be superfluous. It is not surplusage. It compels an employer to pay for each day it has deprived employees of notice, regardless of whether they would have worked on those days.

The Fifth Circuit concluded that the term "back pay" in Section 5(a)(2) referred to pay to which an employee "would have otherwise been entitled if the event that affected such job related compensation had not occurred." A-16. The Fifth Circuit construed that isolated term solely by reference to a decision of this Court, *Phelps*

Dodge Corp. v. NLRB, 313 U.S. 177 (1941). *Phelps Dodge* interprets the remedial provisions of the NLRA, 29 U.S.C. §160(c) (1988), which, as discussed above, is a true make-whole statute, and which renders the Fifth Circuit's reliance on that statute inappropriate. Surely Congress could have written Section 5(a)(1) to provide that an employer is liable for back pay, and said no more. It did not. It intentionally provided for damages for "each day of the violation."

Nevertheless, the Fifth Circuit concluded that "[i]f aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred" (A-17), whereas if a calendar day calculation were used, it "would provide an employee with damages in excess of what he or she would have received had the layoff been deferred until the conclusion of the notice period." A-20. In *Phelps Dodge* this Court recognized that to view the NLRA as simply a vehicle to remedy the monetary loss of individual employees would thwart the central purpose of the NLRA; its primary goal was to effectuate worker self-organization. 313 U.S. at 193. Similarly, the Fifth Circuit's interpretation of WARN as simply a remedy for employees' loss of pay over a two-month period frustrates the purpose of the Worker Adjustment and Retraining Notification Act. WARN's indisputable aim, as its title proclaims, is to provide sufficient notification to permit worker retraining and minimize disruption to local communities. With its ruling, the Fifth Circuit ignored the fact that terminated employees, once deprived of notice, can never recapture

the time allocated to them for minimizing their displacement. As stated by Senator Metzenbaum, one of WARN's chief sponsors, "WARN is about notice, not severance." 134 Cong. Rec. S8543-44 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum).[9]

Under the Fifth Circuit formulation, there is no incentive for an employer to comply with the Act. WARN's focus is on compelling the employer to provide 60 days notice of an impending layoff. 134 Cong. Rec. S8542 (June 24, 1988) (Senator Metzenbaum). An employer which provides its employees with 60 days notice is accorded a benefit under the statute; it pays the employees only for the days they work during the notice period. Herein lies the incentive, for the employer who fails to give notice is, *"for each day of the violation,"* liable to "each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff." (emphasis added). H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052, U.S. Code Cong. & Admin. News 2085 (1988). As the Conferees explained, "each day of the violation" means those days for which notice was due but was not given. *Id.* Payment of a greater amount by the

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[9] The Fifth Circuit decision, in effect, resuscitates an amendment to WARN which was proposed by Senator Quayle but ultimately rejected. 134 Cong. Rec. S8541, 8547 (June 24, 1988). The rejected amendment would have allowed an employer who did not give notice to provide severance pay in lieu of that notice. 134 Cong. Rec. S8541 (June 24, 1988). The amendment was rejected because the important element that WARN's sponsors wanted to retain was giving employees "time to seek readjustment and retraining while they [we]re working." 134 Cong. Rec. S8543(statement of Sen. Metzenbaum).

violating employer encourages compliance with the goal of the Act – 60 days notice.[10]

The Fifth Circuit also overlooked that WARN provides liquidated compensatory damages. It mandates payment, without judicial discretion, for a set duration at an established rate – the employees' regular rate prior to notice. The Act's focus is on making the employer pay a statutorily prescribed amount as a consequence of its failure to give notice, regardless of whether this results in compensatory damages that exceed the wages the employee would have earned.

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[10] The Conference Report establishes that the Fifth Circuit's reliance on legislative history for support of its position is misplaced. The Fifth Circuit cites the following portion of Senate Report No. 62 (1987):

> For violations of the notice provisions, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period,* less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

A-20, (Citing S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) (emphasis added by Fifth Circuit)). But the Senate was reporting on an earlier version of WARN which contained different notice and damages provisions. More significantly, the Conference Report for the bill that eventually became WARN superseded the Senate Report, and establishes, contrary to the Fifth Circuit's holding, that the term "back pay" is only the label for the amount due each day notice was lacking, as discussed above.

If WARN were simply a wage rather than a notice statute, the employer would be liable, as the Fifth Circuit now holds, for the amount of the employee's unpaid wages during the sixty day period. But under WARN the employer is liable for the regular wage rate the employee received *prior* to the notice and does not take into account any intervening wage increases or overtime the employees might have worked. If WARN were truly a "back pay" statute, a court attempting to compensate employees for their employer's failure to give full notice of a plant closure would have to inquire into the circumstances of each affected employee, including the ease or difficulty in finding subsequent employment, and whether subsequent employment was obtained, and would have to consider these factors, before placing a dollar value on each individual employee's injury. As asserted in the Conference Report, to simplify the damages proceeding, Congress established an amount measured by, though not equal to, the employees' regular wage rate to compensate them for their loss of notice, but not pay. *Id.* The Fifth Circuit has clearly given a meaning to the term "back pay" not intended by Congress.

The Fifth Circuit not only was unduly influenced by the term "back pay," but also found persuasive a hypothetical situation posed by North Star Steel Company and reported but not addressed by the Third Circuit. A-21 (citing *North Star Steel,* 5 F.3d at 43 n.6). The Fifth Circuit reasoned that a full-time employee working forty hours a week, eight hours a day would be paid less damages under the calendar day computation than a part-time employee working one day a week for ten hours. For the Fifth Circuit this example demonstrated the inequitable

effects of the "calendar day" approach even though no such inequities arose in the case before it, in which the class of plaintiffs included numerous part-time employees. A-22 & n.16, 74. Therefore, the Fifth Circuit concluded "that damages in lieu of the WARN Act notice are to be calculated using on [sic] the number of work days within the violation period." A-22. The Fifth Circuit did so, even though WARN, as a remedial statute, should be liberally construed in favor of the class it was intended to protect. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

But the Fifth Circuit failed to read WARN's damages provisions *in pari materia*. Had it done so, it would have seen that the statute itself foils its hypothetical. For it requires that employees receive "back pay for each day of violation at a rate of compensation not less than the higher of . . . the average *regular rate* received by such employee during the last 3 years of the employee's employment or . . . the final *regular rate* received by such employee." 29 U.S.C. §2104(a)(1)(A)(i)&(ii) (1988) (emphasis added). The term "regular rate" is a term of art in labor law, drawn from the Fair Labor Standards Act ("FLSA"); indeed, the "regular rate" language was imported wholesale from the FLSA, 29 U.S.C. §207(o)(4) (1988). It differs from "wage rate" because it takes into account all compensation received by the employee, and is determined by dividing the compensation by the number of hours a week the employee is scheduled to work. 29 C.F.R. §778.109 (1993). The regular rate is used in the FLSA to establish the rate at which overtime must be paid for work in excess of forty hours in a work week. The FLSA's provisions revolve around a 40-hour work week;

certainly, its maximum hours, overtime and compensatory time provisions are keyed to this statutory assumption. 29 U.S.C. §207(a),(o) (1988). Given that related WARN provisions have been interpreted with reference to the FLSA[11], and further given the expressions of the Conference Report, it is clear that the statute requires payment at the regular rate for each day of violation, based upon a 40-hour work week.

This is precisely how the parties here computed the damages due to part-time employees based upon the trial court's calendar approach to damages. The part-time employees' hours were averaged, as were all employees' hours, over a 40 hour, five-day work week. For example, an employee who worked full-time was considered to have worked 40 hours per week, eight hours per day, and a part-time employee who worked 20 hours per week was considered to have worked four hours per day, five days per week, regardless of the actual work schedule, and each received damages accordingly. This was proper because WARN makes no reference to a work schedule, or for that matter, to work days. It refers only to the employee's "regular rate."

It is a basic canon of statutory construction that identical terms used within the same act bear the same meaning. *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, ___ U.S. ___, 113 S.Ct. 2006,

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[11] *See, e.g.*, 54 Fed. Reg. 16049 (Apr. 20, 1989) (noting the DOL's intent to rely on definitions found in the FLSA for determining whether a reduction in hours has caused an employment loss and that this examination was to be based on a 40 hour work week).

2011 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2596 (1992); *Sullivan v. Stroop*, ___ U.S. ___, 110 S.Ct. 2499, 2503 (1990). The Fifth Circuit ignored this principle when it disregarded the phrase "each day of such violation," in Section 5(a)(3) of WARN and Congress' interpretation of that phrase.

Under WARN an employer who fails to give adequate notice to employees is not only liable to them, if he fails to properly notify government officials, he is also "subject to a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. §2104(a)(3) (1988). The legislative history explains that "the maximum penalty payable to a local government is $30,000." H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1053, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2086. The only way the governmental unit could receive $30,000 is by using the calendar day formula applied by the Third Circuit: 60 calendar days multiplied by $500. This sister provision to the employee damages provision cannot, therefore, be keyed to "work days" as the government could then never receive damages for the full 60 days it would be due. With respect to the employees, there is no rational basis to conclude that the identical phrase "each day of violation" has a different meaning within two subparagraphs of the same subsection of WARN, and with each subparagraph addressing the same topic – damages.

Not only the language of the statute but the legislative history supports the conclusion that these two damage provisions were meant to be measured identically.

Senator Kennedy, one of the Act's chief sponsors, stated:

> I rise in support of S. 2527, the Worker Adjustment and Retraining Notification Act. The bill is identical to the advance notice provision that was included in the conference agreement on the recently vetoed trade bill. Remedies for violations are limited to money damages – the equivalent of a day's wages and fringe benefits for each day of violation for each affected employee and up to $500 for each day of violation for an affected community.

134 Cong. Rec. S8375 (daily ed. June 22, 1988). Senator Kennedy made it clear; "back pay" is a measurement of damages and is meant to be calculated, as is the penalty for failing to notify a governmental unit, for each of the 60 days that notice is lacking.

The Fifth Circuit's decision is insupportable from any vantage point. It conflicts with a decision of the Third Circuit, which persuasively concludes that damages are due for each calendar day notice was lacking. The opinion relied on legislative history that was inapplicable because it was superseded by the Conference Report, failed to address the import of the phrase "period of violation" as if it were not in the statute, and ignored parallel provisions of the Act that plainly demonstrated that "period of violation" requires damages for each day notice was not provided. Given that this damages issue will be confronted by every employer of more than 100 employees and every employee subject to the WARN Act, both of which have been substantial in number since WARN's inception, a writ of certiorari should issue to the Fifth Circuit.

C. The Fifth Circuit's interpretation of WARN, Section 5(a)(2), creates conflicts with regulations adopted pursuant to WARN by the Department of Labor and excludes from the Act's protections many part-time employees whom Congress intended to protect.

The Fifth Circuit's interpretation not only creates internal conflicts within the Act but also conflicts with the DOL regulations. Although Congress intended that seasonal employees and employees on temporary layoff be protected by WARN, those employees will now be excluded from receiving damages under the Act in the Fifth Circuit and in any other circuit which adopts the Fifth Circuit's interpretation.

Section 8 of WARN, 29 U.S.C. §2107(a) (1988), authorizes the Secretary of Labor to prescribe such regulations as may be necessary to carry out WARN, including "at a minimum . . . interpretative regulations . . . . "[12] The Fifth

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[12] Although the interim regulations published by the Department of Labor ("DOL") on December 2, 1988 were interpretative, the final regulations issued April 20, 1989 were substantive. *See* 53 Fed. Reg. 48884 (Dec. 2, 1988) (referring to the interim regulations as "an interim interpretative rule interpreting the provisions of the Workers Adjustment and Retraining Notification Act [WARN]; 54 Fed. Reg. 16042, 16043 (Apr. 20, 1988) ("The proposal referred to these rules as interpretative regulations. Upon reevaluation, this reference has been eliminated in the final regulation.") Because they were issued by an agency, the DOL, pursuant to statutory authority, the WARN Act, and were promulgated in accordance with the procedural requirements of the Administrative Procedure Act, they have the force and effect of law. 5 U.S.C. §§553, 706 (1988); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Therefore the DOL regulations are binding and should not be set aside unless

Circuit's interpretation of WARN's damage calculation fails to give deference to the DOL regulations which include within the definition of "affected" and "aggrieved" employees, seasonal employees and employees on temporary layoff with a right of recall. The Fifth Circuit ruled that aggrieved employees should be paid only for days they ordinarily would have worked during the sixty-day notice period. A-17. It correctly noted that the violation period was composed of those days after the employee had been terminated or the employee's hours were substantially reduced. A-18 n.14.

Under WARN, part-time employees are those who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than six of the twelve months preceding the date on which notice is required. 29 U.S.C. §2101(a)(8) (1988). While part-time employees are not counted in determining whether a number of employees sufficient to constitute a mass lay-off or plant closing have been laid off or terminated, once that threshold has been met, part-time employees can be "affected employees" entitled to notice. 29 U.S.C. §§2101(a)(2), (3), & (5) & 2102(a)(1) (1988); 20 C.F.R. §639.6(b) (1993). The WARN regulations explain that "the term 'part-time employees' includes workers who would traditionally be understood as 'seasonal' employees." 20 C.F.R. §639.3(h) (1993). This regulation is based on the Act's legislative history which indicates that a separate definition of "seasonal employee" was eliminated when

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found to be arbitrary and capricious. 5 U.S.C. §706(2) (1988); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988).

those employees were subsumed under the rubric of "part-time employees."

> The Senate Amendment defines a "part-time employee" as one who is hired to work an average of fewer than 15 hours per week. It also defines a "seasonal employee" as one who is hired for a period not to exceed 3 months per year to do work that is seasonal in nature. The Conference Agreement combines these concepts into a single definition of "part-time" employee, which includes employees who work fewer than 20 hours per week or who have worked fewer than 6 months in the 12-month period prior to the point at which the employer is required to serve notice. The definition of "seasonal employee" is therefore eliminated.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1047, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2080. Seasonal employees who can reasonably expect to experience an employment loss as a result of a plant closing or mass layoff are entitled to notice unless they fall within the "temporary employment" exception. 20 C.F.R. §639.5(c) (1993).

Under WARN, if an employee is entitled to notice and does not receive it, she is an "aggrieved employee," and the employer is liable to her in damages. 29 U.S.C. §2104(a)(7) (1988). However, according to the Fifth Circuit formulation, seasonal employees, though "affected" and entitled to notice, would not be entitled to damages. This result is contrary to the Act's dictates which hold an employer who violates its notice provisions "liable *to each aggrieved employee*. . . . " 29 U.S.C. §2104(a)(1) (1988) (emphasis added).

The case of *Washington v. Aircap Industries Corporation*, 831 F. Supp. 1292 (D. S.C. 1993), demonstrates that this is not simply a hypothetical issue. *Washington* concerned an employer which historically laid off some employees at the start of the summer and rehired them at the end of the summer. However, in June of 1991, at the time of its usual seasonal layoffs, the employer informed employees that they would be laid off for more than six months. The district court concluded that these employees did not fit within the temporary employee exception to notice. 831 F.Supp. at 1297. The court further ruled that notice was inadequate even though at the time notice was given, employees were expecting their normal seasonal layoffs.

The *Washington* court has not yet addressed damages; presumably, however, those who were "affected" by the layoffs, are entitled to damages; otherwise, there would be no incentive for any employer to provide notice to them, and, as noted WARN provides that employers are liable to each "aggrieved employee." 29 U.S.C. §2104(a)(1) (1988). However, under the Fifth Circuit formulation, those employees who were regularly laid off for the summer months, would not have been entitled to damages because they would not have earned any wages *during the violation period*.

The results would be the same for employees who were already on temporary layoff at the time of a plant closing or mass layoff. The regulations explain that the term "employee" includes "[w]orkers on temporary layoff or on leave who have a reasonable expectation of recall. . . . " 20 C.F.R. §639.3(a)(1) (1993). If a worker were

on temporary layoff but expected to be recalled to work, she would be an "affected employee" entitled to notice.

That was exactly the situation in *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1276 (E.D. Tenn. 1990). In that case the employer laid off 500 people on May 18, 1989. 748 F.Supp. at 1282. Of that 500, 230 were given a definite return date within two weeks at which time they were returned to work. The other 270 were laid off indefinitely, but 111 of those were recalled by June 26, 1989. *Id.* On June 26, 1989, 496 of the plant's 803 active employees were laid off. The district court concluded that 159 individuals who were laid off indefinitely on May 18, 1989, were "affected" employees under the Act. 748 F.Supp. at 1284-85. Those 159 employees had only been temporarily laid off on May 18, because the employer had lead them to believe that they would be recalled in the near future. *Id.* at 1285.

The *Jones* court found that "[t]here [w]as no requirement that aggrieved employees be on defendant company's active payroll at the time they suffer an employment loss in order to be entitled to damages." *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292, 1298 (E.D. Tenn.), *modified*, 753 F.Supp. 218 (E.D. Tenn. 1990).[13] However, an employee already on temporary layoff naturally would not have earned any wages during the violation period and would not be entitled to damages under the Fifth Circuit formulation.

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[13] The *Jones* court calculated WARN damages by using work days rather than calendar days; however, the method of calculation did not appear to be a disputed issue in that case. 748 F.Supp. at 1296.

The Fifth Circuit's interpretation of the WARN liability provision, while attempting to resolve the supposed inequities of a hypothetical situation involving part-time employees, instead created conflicts within the Act and with regulations with resulting inequities to employees whom Congress sought to protect. These can be resolved only through the issuance of a writ of certiorari.

VI. CONCLUSION

A recent DOL study found that the median time for a displaced worker to eventually find a new job is 8.3 weeks.[14] Resolution of the WARN damages issue now will give workers, their families and communities transition time to adjust to the *prospective* loss of employment. 20 C.F.R. §639.1(a) (1993).

If this Court grants petitioners' writ application and finds that the Third Circuit's interpretation is correct, employers will be encouraged to give notice rather than to pay employees for lack of notice. If this Court determines that the Fifth Circuit's formulation is the correct one, employers planning mass layoffs or plant closings will decide it is in their best interest to either give the necessary notice or to pay the amount for which they are liable. In either case, both employees and employers will be able to agree on the amount which employees are due, and will be more likely to settle their disputes without

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[14] Gardner, *Recession Swells Court of Displaced Workers*, United States Department of Labor, 116 Monthly Labor Review 14 (June 1993).

recourse to litigation. In turn employees will be more likely to receive 60 days notice or pay in lieu of notice at the time of their layoffs as contemplated by Congress, rather than years afterward, as in the present case.

For the foregoing reasons, the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-3419
92-3613

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS & VICINITY, ET AL.,

Plaintiffs-Appellees,
Cross-Appellants,

versus

DILLARD DEPT. STORES, INC., Etc., ET AL.,

Defendants-Appellants,
Cross-Appellees.

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STEPHEN J. PLESCIA, Etc., ET AL.,

Plaintiffs-Appellees,

versus

DILLARD DEPT. STORES, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(Filed Feb. 22, 1994)

Before POLITZ, Chief Judge, REYNALDO G. GARZA, and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

For the first time, this court is called upon to address the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101 et seq. (Supp. 1993). It requires some employers – generally those who are curtailing or closing an operation – to provide sixty days notice to those employees who will be laid off or whose hours will be substantially reduced. In 1989, D.H. Holmes Co., Ltd. merged with Dillard Department Stores, Inc., resulting in the layoff of a large number of people – mostly former Holmes employees – whose job functions had become redundant. These former employees sued Dillard, alleging that in the course of the ongoing merger efforts, Holmes and Dillard had failed to provide adequate notice of the pending terminations. The district court generally ruled for the former employees and awarded some damages to them. Both Dillard and the former employees appeal, raising various issues that in turn we will address. We begin with the relevant facts.

I

In 1988, as a result of steadily declining profits and revenues, Holmes, a long-established and time-honored retail department store headquartered in New Orleans, Louisiana, hired investment counselors to find a solution to its financial problems. Through the investment counselor's efforts, Holmes and Dillard entered into negotiations in the latter part of 1988 for the merger of the two

corporations. A merger agreement was ultimately reached between representatives of the two parties. Under this agreement, Holmes would merge with DDS Acquisitions Corporation ("DDS"), a wholly-owned transient subsidiary of Dillard, with Holmes continuing as the surviving wholly-owned subsidiary of Dillard.[1] On March 3 and 6, 1988, the agreement was approved by the respective boards of directors of both Dillard and Holmes. Still, it was not yet a done deal. One of the conditions of the agreement was that no less than eighty percent of Holmes's stockholders must approve the merger. Before any vote by the stockholders, however, Dillard and Holmes were required to furnish Holmes's stockholders with registration statements outlining the parties' respective financial conditions. Further yet, the Securities and Exchange Commission ("SEC") required that such registration statements must be pre-approved by the SEC before issuance. Pursuant to SEC regulation, Dillard and Holmes filed the proposed registration statement with the SEC on or about March 7, 1989. Efforts were made to have the SEC expedite its decision concerning the registration statement; however, neither Holmes nor Dillard could anticipate precisely when the SEC would approve the registration statement. Approximately

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[1] In corporate tax parlance, this is known as a "reverse triangular merger." *See* 26 U.S.C. § 368(a)(2)(E) (Supp. 1993); *see also* BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS, § 14.15(1) (5th ed. 1987). *See infra* note 12. Although technically, Holmes merged with DDS, for ease of reference we will refer to this merger as the merger between Holmes and Dillard unless specifically referred to otherwise.

one month after the statement was filed, the SEC approved the registration statement. Having received SEC approval, Holmes then scheduled a stockholders' meeting for May 9, 1989.

On April 19, 1989, at the direction of Dillard's personnel, Holmes notified its employees assigned to the corporate planning division and the warehouse facilities that they would be terminated as of May 9 if Holmes's stockholders approved the proposed merger with Dillard. Certain "transitional" employees at the warehouse facilities and the corporate offices received notification between April 21 and 28, informing them that they would be laid off sometime between May 9 and July 1. Finally, on May 12, employees in the Canal Street retail store were notified that they would be laid off between June 10 and July 8.

Because it was clear that the WARN Act sixty-day notice requirement would not be met with respect to certain employees, Dillard[2] made efforts to comply with WARN's damages provision. First, Dillard determined which employees were entitled to payments under the WARN Act, and as to those employees, the amount owed. Under Dillard's interpretation of the statute, part-time employees were not entitled to the notice, and, as such, they were not entitled to any damages in lieu of notice. Dillard further determined that the sixty-day penalty period in 29 U.S.C. § 2104(a)(1)(A) referred to the number of work days within that period rather than the number

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[2] In respect to events that occurred after the merger, a reference to Dillard should be interpreted as including Holmes, unless Holmes is specifically discussed separately.

of actual calendar days. This interpretation meant that each full-time employee who had not received the full sixty-day notice would be entitled to payment for those days the employee would have worked had the full sixty-day notice been given. Relying on the provisions of § 2104(a)(2) of the Act, Dillard also concluded that it could deduct from this amount any severance pay or vacation pay that Dillard owed the employee.

After the two companies merged, and as a direct result of the merger, numerous employees were involuntarily terminated between May 8 and August 9, 1989. These former employees[3] sued a number of defendants, arguing that Dillard violated the WARN Act when it failed to provide the "affected employees" the required sixty-day notice of termination. In addition, the employees argued that Dillard failed to pay them the proper amount of damages in lieu of notice.

II

Initially, the employees sued Dillard and Holmes. Later, however, the employees amended their complaint, adding as defendants individual officers and directors of

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[3] The former employees constitute a class that we will refer to as "the former employees" or simply "the employees." That class is composed of "all former employees of either D.H. Holmes Co., Ltd. (Holmes) and or Dillard Department Stores, Inc. (Dillard) who were involuntarily terminated from employment between May 8, 1989, and August 9, 1989, as a result of the acquisition of Holmes by Dillard and who did not receive sixty (60) days written notice of said termination either personally or through their representative." *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F.Supp. 297, 300 (E.D. La. 1991).

both Holmes and Dillard, as well as the Federal Insurance Company ("Federal Insurance"), Holmes's and Dillard's fiduciary liability insurer. As this lawsuit progressed, a number of motions were filed and ruled upon, and some of these rulings form the basis of this appeal and cross-appeal. First, in February 1991, the employees moved for partial summary judgment on the issue of liability under the WARN Act. In turn, Dillard moved for partial summary judgment, seeking to exclude from the plaintiff class certain groups of individuals that Dillard argued were not "affected employees"[4] under the statute. Dillard further sought to dismiss the employees' claim against the individual officers and directors of both Holmes and Dillard. Ultimately, the court granted the employees' motion for partial summary judgment, stating that Dillard violated the WARN Act. As to Dillard's motion, the district court granted partial summary judgment, dismissing the claims against the individual officers and directors. The court, however, did not exclude any of the contested members from the plaintiff class. In addition, because the officers and directors had been essentially dismissed from the suit, the court dismissed Federal Insurance from the suit because its only liability was tied to the possible liability of the officers and directors who had also been dismissed. *See Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F.Supp. 297 (E.D. La. 1991).

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[4] The WARN Act defines "affected employees" as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employers." 29 U.S.C. § 2101(a)(5) (Supp. 1993).

In addition to its motion for summary judgment, Dillard had also filed a cross-claim against Federal Insurance and a third-party complaint against Liberty Mutual Insurance Company ("Liberty Mutual"). Dillard alleged that both insurance companies owed Dillard coverage, defense, and indemnity pursuant to a fiduciary liability insurance policy issued by Federal Insurance, and commercial general liability policies issued by Liberty Mutual. In response to Dillard's cross-claim, Federal Insurance moved for summary judgment, arguing that no coverage existed under its policies based on the allegations contained within the plaintiffs' complaint. Liberty Mutual also moved for summary judgment, asserting lack of coverage. The court granted summary judgment for both insurance companies. *Id.*

In September 1991, Dillard filed a second motion for summary judgment, this time alleging that the WARN Act is unconstitutional. The district court, in a separate opinion, denied Dillard's motion, holding that the WARN Act did not suffer any constitutional infirmities. *See Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F.Supp. 318 (E.D. La. 1991).

In November 1991, the damages issue was tried to the district court, and the court awarded damages to employees. Following the trial, the employees sought prejudgment interest on the damage award, which the district court granted. In February 1992, the employees, in a separate civil action, further sought costs and attorneys' fees. Following an evidentiary hearing, the court ordered Dillard to pay attorneys' fees and costs to the employees for both the original action as well as for the subsequent action seeking the attorneys' fees and costs.

See Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 790 F.Supp. 663 (E.D. La. 1992).

III

Dillard raises four issues on appeal. First, Dillard challenges the district court's determination that the WARN Act is constitutional.[5] Next, Dillard argues that the district court erred in holding that Dillard violated the WARN Act. However, even if Dillard did in fact violate the Act, Dillard contends that the district court improperly calculated the amount of damages Dillard owed its former employees. Finally, Dillard asserts that the district court erroneously granted summary judgment in favor of Federal Insurance and Liberty Mutual.[6]

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[5] Dillard makes several arguments in support of its contention that the WARN Act is unconstitutional. Their arguments are meritless, and we affirm the district court's order denying Dillard's motion for summary judgment on that basis. *See Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F.Supp. 318 (E.D. La. 1991).

[6] Dillard argues that the district court erred in granting summary judgment in favor of Federal Insurance and Liberty Mutual because the plain language of the policies provide coverage, or alternatively, if the language of the policies was ambiguous, the policies should be construed in favor of coverage. Both policies, however, clearly do not provide coverage for liability imposed by the WARN Act. With respect to Federal Insurance, the policy in question provided coverage only for specifically defined "wrongful acts," of which violation of the WARN Act was not included. As to Liberty Mutual, their policy provided coverage for liability arising out of errors in the administration of an employee benefit program, or in connection with providing improper advice concerning such programs. Thus, we affirm the district court's grant of summary judgment on this issue.

In their cross-appeal, the former employees raise four issues for our consideration. First, the employees contend that the district court mistakenly determined that certain employees – the Bienville employees – were not "affected employees" as defined by the statute, and, as a result, those employees were erroneously denied benefits under the Act. Next, the employees argue that the district court erroneously concluded that the notices of termination that did not designate a specific date of termination constituted notice. Third, the employees contend that the district court improperly calculated the amount of attorneys' fees Dillard owed the employees. And, finally, the employees argue that the district court erred in applying regulations retroactively to a specific employee to deny her pay.

IV

We review a grant of summary judgment *de novo*. *FDIC v. Myers*, 955 F.2d 348, 349 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). We examine the record independently to determine if the movant is entitled to judgment as a matter of law, drawing any factual inferences in the light most favorable to the non-movant. *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989). Questions of law are subject to *de novo* review, *United States v. Long*, 996 F.2d 731, 732 (5th Cir. 1993), while findings of fact will be

disturbed only if we find that they are clearly erroneous. FED. R. CIV. P. 52(a).

A. Did Dillard Violate the WARN Act?

Although Dillard and Holmes acknowledge that certain affected employees did not receive the full sixty days notice of termination,[7] they argue that they were excused from the notice requirements because they fell within one of the two statutory exemptions. Under the facts of this case, Dillard and Holmes can escape WARN Act liability only if either the "faltering company" exception or the "unforeseen business circumstances" exception applies.

To fall within the "faltering company" exemption, an employer must meet four requirements. The Act states that

> an employer may order the shutdown of single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that the giving the notice required would have precluded

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[7] Dillard does not challenge the fact that it initially falls within the general scope of the WARN Act. Dillard does not assert that it is not an "employer" within the meaning of WARN. 29 U.S.C. § 2101(a)(1) (Supp. 1993). Likewise, Dillard concedes that the layoffs and closings of the facilities at issue here fall within the WARN Act definition of "plant closing" and "mass layoff." 29 U.S.C. §§ 2101(a)(2), (3) (Supp. 1993).

> the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1) (Supp. 1993). This exception applies only when a layoff is caused by the employer's failure to obtain sufficient capital. *See* 54 Fed. Reg. 16061 (April 20, 1989) ("The need for notice will only be triggered if the employer fails to obtain the business or financing it seeks."). In this case, however, there is no causal connection between Holmes's[8] search for capital and the ultimate reduction in work force. Although it is true that at the time notice should have been provided Holmes was actively searching for a new line of credit, the actual cause of the mass layoff was not a failure to obtain an adequate line of credit; instead, the cause of the layoff was the merger between Holmes and Dillard. Because there was no causal relationship between Holmes's search for additional capital and the reduction in its work force, the "faltering company" exception does not apply to exempt it from liability for failing to give notice for the ultimate layoff, which was in fact caused by the merger.

Next, Dillard contends that its failure to provide the full sixty days notice was excused under the "unforeseen business circumstances" exemption. This exemption provides that "[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102fb (2)(A) (Supp. 1993). According to the proposed

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[8] Dillard, a financially healthy organization, has never argued that it was entitled to "faltering company" status.

rules, an unforeseeable circumstance is "caused by some sudden and unexpected action or condition outside the employer's control."[9] 20 C.F.R. § 639.9(b)(2) (1988) (proposed regulations).[10] As with the "faltering company" exception, this exception to the general rule is to be narrowly construed. 20 C.F.R. 639.9(a) (1989) (final regulations).

Dillard argues that there was some uncertainty as to when, or even if, the SEC would approve the registration statement, and as to whether Holmes's stockholders would approve the merger. Therefore, it asserts, the resulting merger was an "unforeseen business circumstance." We cannot agree. For several months prior to March 9 – the date notice should have been given for the May 9 layoff – Dillard and Holmes had been intensely negotiating an agreement that would allow the two companies to merge. On March 6, three days before notice

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[9] Examples provided by the regulations include "a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn." 20 C.F.R. § 639.9(b)(2) (1988) (proposed regulations).

[10] The WARN Act was enacted on August 4, 1988, and it took effect on February 4, 1989. The Department of Labor ("DOL") promulgated proposed regulations in December 1988, and later issued final regulations on April 20, 1989, which took effect on May 22. *See* 54 Fed. Reg. 16042-01 (1989). In many respects, the proposed regulations are identical to the final regulations. In those cases, we will cite to the final regulations. However, in those instances where the final regulations differ from the proposed regulations, we will cite to those regulations in effect at the time in question. *See infra* note 19.

should have been given, a tentative agreement was reached. Both companies then sought SEC approval, and both companies actively promoted the merger. It is difficult to see how two companies that were busy promoting their merger can now argue that the resulting merger was unforeseeable. The fact that there were some uncertainties in the merger process does not make the resulting merger unforeseeable. We conclude that the merger was in fact foreseeable. Consequently, we hold that neither the merger itself nor any of the individual steps taken to effect the merger constitute "unforeseen business circumstances."[11] Because Dillard and Holmes are unable to satisfy the requirements of either exception under the WARN Act, sixty days notice of termination was required.[12]

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[11] Even if Dillard and Holmes had fallen within the scope of either the "faltering company" exemption or the "unforeseen business circumstances" exemption, both failed to provide proper notice under the DOL regulations. If an employer is providing less than sixty days notice pursuant to one of the statutory exemptions, the employer must "provide a brief statement of the reasons for reducing the notice period. . . . " 20 C.F.R. § 639.9 (1989) (final regulations). None of the notices provided to employees contained a brief statement of the reasons for providing less than sixty days notice.

[12] Dillard also argues that the district court erred in determining that Dillard and Holmes were jointly and severely liable because the "merger" between Holmes and Dillard was not a "sale" as contemplated by the Warn Act. *Carpenters Dist. Council*, 790 F.Supp. at 666-67; *see also* 29 U.S.C. § 2101(b)(1) (Supp. 1993). We disagree, and we affirm the district court's holding on this issue except to the extent that the district court held that the "merger" between Dillard and Holmes was not a "merger" under Louisiana law. *Carpenters Dist. Council*, 790 F.Supp. at 666, n.7. As the district court correctly noted, this "merger" consisted of a transaction among three corporate entities – Holmes,

B. Work Days vs. Calendar Days

The next issue concerns whether the district court erred by calculating damages on the basis of calendar days instead of work days. Dillard contends that the district court improperly included in the damage award payment for non-work days *i.e.*, Saturdays, Sundays, and holidays. The district court held that "the time period for which penalty payments would be due are 60 individual work days and not the number of work weeks contained within a 60 day period." *Carpenters Dist. Council*, 778 F.Supp. at 308.

The absolute starting point for interpreting a statute is the language of the statute itself. *United States v. Sosa*, 997 F.2d 1130, 1132 (5th Cir. 1993); *In re Hammers*, 988 F.2d 32, 34 (5th Cir. 1993). If the language is clear and unambiguous, then the court may end its inquiry. *United States v. Sosa*, 997 F.2d at 1132. If, however, a statute is susceptible to more than one reasonable interpretation, then the reviewing court must look beyond the language of the statute in an effort to ascertain the intent of the legislative body. *In re Hammers*, 988 F.2d at 34.

Dillard, and DDS Acquisition Corporation, a wholly owned subsidiary of Dillard. After the respective stockholders of each corporation approved the merger plan, DDS and Holmes merged, with Holmes continuing in existence as the surviving wholly-owned subsidiary of Dillard. In corporate tax parlance, this is known as a "reverse triangular merger." *See supra* note 1.

Section 2104[13] spells out in some detail the amount of damages an employer must pay if it does not provide its employees with adequate notice of a mass layoff or a

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[13] Section 2104 provides in pertinent part:

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of [the WARN Act] shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for –

(A) back pay for each day of violation at a rate of compensation not less than the higher of –

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; * * *

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by –

(A) any wages paid by the employer to the employee for the period of violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; * * *

(3) Any employer who violates [the WARN Act] with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation * * *

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. * * *

29 U.S.C. § 2104 (Supp. 1993).

plant closing. If an employer violates the notice provision, the employer must pay the aggrieved employee "back pay for each day of the violation [period]." 29 U.S.C. § 2104(a)(1)(A) (Supp. 1993). On one hand, the term "back pay" connotes a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred. On the other hand, "each day of the violation" appears to require payment of "back pay" damages for each calendar day within the violation period, which would put the employees in a significantly better position than they would have enjoyed had the employer provided the full sixty-day notice. *See United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 13, 1993) (No. 93-936) (holding that the statute requires payment of damages based upon the number of calendar days within the violation period); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292, 1296 (E.D. Tenn. 1990)(holding that the statute requires payment of damages based upon the number of work days within the violation period). Because the statute is susceptible to more than one reasonable interpretation, we will examine all available materials to determine the intent of Congress. Our starting point, however, is the statute.

Interpreting WARN's damage provision as requiring payment for work days only is well supported by the language of the section. First, the term "back pay" commonly means *pay, i.e.*, wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred. Indeed,

the Supreme Court has said that "back pay" requires "payment . . . of a sum equal to what [the employees] normally would have earned" had the violation never occurred. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941). Further, the Supreme Court has explained that "back pay" suggests a remedy such that the damaged employee is restored "as nearly as possible, to that which would have [been] obtained but for the [violation]." *Id.* at 194. If aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred.[14] *But see United Paperworkers*

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[14] The Third Circuit, however, provides two arguments for interpreting the term "back pay" as requiring payment for each calendar day within the violation period, and in doing so, they have, in our view, essentially written the term out of the statute. *See United Steelworkers of America v. North Star Steel Co.*, 5 F.3d at 41-43 (holding that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable"). In *Steelworkers*, North Star Steel argued that the term "back pay" should connote a "lost earnings" concept. Under the "lost earnings" concept, an employee would receive payment for time he or she would have worked during the sixty-day notice period, but was not allowed to. The Third Circuit rejected this argument because of the effect the "lost earnings" concept would have on other sections of the statute. They reasoned that the lost earnings concept would render superfluous § 2104(a)(2) – the damage provision that allows an employer to reduce damages by wages paid for work performed during the violation period. *See supra* note 13. According to the Third Circuit, adopting the "lost earnings" concept would render § 2104(a)(2) superfluous because "lost earnings" reflect a net earnings figure; in other words, the "lost earnings" calculation would *by definition* subtract wages an employer had already paid the employee for

Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51, 55 (2d Cir. 1993) (stating in dicta that a WARN Act claim is not a

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work performed during the violation period, and as such, there would be no need for § 2104(a)(2). This argument, however, is based upon a flawed reading of the statute that disregards the statutory distinctions between termination of an employee and reduction of an employee's work hours. As the Conference Report clearly states, the violation period is composed of those days *after* the employee has been terminated or *after* the employee's hours have been substantially reduced without adequate notice. H.R. CONF. REP. NO. 100-576, 100th Cong., 2nd Sess. 1052 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2085. Section 2104(a)(2) allows an employer to deduct wages earned for work performed *during* the violation period. This section is effective only in those instances where the "employment loss" is a substantial reduction in hours, as opposed to complete termination. *See* 29 U.S.C. § 2101(a)(6)(C) (Supp. 1993). Where an employee's hours are reduced without proper notice, the employee will continue to work *during* the violation period. Where, as here, the employee is *terminated*, § 2104(a)(2) is inapplicable because by definition an employee who has been terminated cannot earn any wages *during* the violation period. The Third Circuit mistakenly concluded that employees who have been *terminated* can earn wages during the violation period. They further concluded that § 2104(a)(2) allows an employer to deduct wages earned *before* the violation period – something that § 2104(a)(2) expressly disallows. Thus, the Third Circuit's argument against using the lost earnings concept for "back pay" fails to withstand scrutiny.

The Third Circuit further reasoned that there would be an additional "conflict between Subsections 2104(a)(1) and 2104(a)(2)(A)" if "back pay" were interpreted as meaning "lost earnings". *United Steelworkers*, 5 F.3d at 43. Under WARN, an employer is entitled to reduce its liability to aggrieved employees only by those payments within the categories set forth in § 2104(a)(2) that an employer paid to its employees. According to the Third Circuit, the concept of lost earnings, which is remedial, is inconsistent with the statutory scheme; a

true claim for back pay because it does not compensate for past services, but nevertheless stating damages "are measured as two months pay and benefits").

Second, the legislative history makes it clear that Congress intended the "back pay" language in WARN to connote the traditional back pay remedy as discussed in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941) (damages "of a sum equal to what [the employees] normally would have earned" had the violation never occurred). The Senate Report states that

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true lost earnings scheme would allow the employer to reduce its liability by *any* earnings that the employees received during the period of violation, even if those earnings were received from a subsequent employer. *Id.* The WARN Act, however, does not include a provision that would allow an employer to deduct wages earned by an employee from other sources. Consequently, the Third Circuit concluded, "back pay" could not have been intended to connote a lost earnings concept. *Id.* We find this argument unpersuasive. Although we agree that the lost earnings concept creates a remedy that is *generally* remedial in nature, we are untroubled by the fact that the statutory scheme fails to provide a remedy that is something other than a pure "make whole" remedy. There are plausible reasons why Congress could choose not to include a provision that would make the WARN compensation provisions purely remedial, *e.g.*, the desire to avoid placing a burden on a terminated employee to mitigate damages by taking any job offered, the desire to give a terminated employee a window of time to readjust without immediately having to search for a job, the desire for simplicity in the statutory scheme, etc. Without express language or legislative history directing us to a reason or other motivation behind this decision, we will not speculate as to the hidden significance, if any, behind the lack of such a provision.

> [f]or violations of the notice provisions, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period,* less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. REP. NO. 62, 100th Cong., 1st Sess. 24 (1987) (emphasis added). Damages calculated by measuring the wages the employee would have received had the employee continued working requires a calculation using the number of work days in the violation period rather than the number of calendar days. To use calendar days would provide an employee with damages in excess of what he or she would have received had the plant remained open, or had the layoff been deferred until the conclusion of the notice period.

Finally, unlike the "calendar-day" approach advocated in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 43 (3d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 13, 1993) (No. 93-936), the "work-day" interpretation of WARN's damages provision does not lead to anomalous results. A well-accepted canon of statutory construction requires the reviewing court to avoid any interpretation that would lead to absurd or unreasonable outcomes. *Birdwell v. Skeen*, 983 F.2d 1332, 1337 (5th Cir. 1993). In *United Steelworkers*, defendant North Star Steel Co. provided the court with a hypothetical situation which, they argued, demonstrated the inequities inherent in the "calendar-day" approach.

United Steelworkers of America v. North Star Steel Co., 5 F.3d at 43. The Third Circuit, however, dismissed North Star's argument,[15] but we find North Star's hypothetical to be a good example of why the "calendar-day" approach cannot be the approach Congress intended. In this hypothetical situation, an employer violates the WARN Act by terminating employees without providing any advance notice. Thus, the violation period contains sixty days. Employee "A" is a full-time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the Third Circuit's calendar-day approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days). As North Star Steel argued, it would be anomalous for the one-day-per-week part-time employee to receive 120 hours pay over and above that paid to the five-days-per-week full-time employee. Under this calendar-day system, not only

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[15] The Third Circuit dismissed North Star Steel's hypothetical situation because it was unwilling to discuss the method of calculating daily damages under §§ 2104(a)(1)(A)(i) and (ii). *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d at 43. We find it unnecessary to discuss the method of calculating daily damage rates under those provisions before discussing the hypothetical situation presented by North Star Steel; indeed, the precise method of calculation raises many questions. It is clear, however, that those provisions require the calculation of damages based on the daily amount an employee earns, and regardless on how the amount of daily damages is reached, North Star Steel's hypothetical situation illustrates the anomalous results that emanate from the calendar day approach.

is the employer severely penalized for choosing to pay damages in lieu of notice, but the full-time employee is treated inequitably, and the part-time employee gets a windfall.[16] Under the "work-day" approach, however, such bizarre results do not occur. Employee "A" is paid for the number of work days Employee "A" would have worked within the sixty-day period, which would work out approximately to eight hours per day times five days per week times eight weeks. Employee "B", on the other hand, would receive payment in lieu of notice that would reflect the employee's part-time status, *i.e.*, approximately ten hours per week times eight weeks. This is a plain-sense result in a day and time when it is common to find employees with work schedules that vary from the traditional eight-hour day, forty-hour work week. It is for the foregoing reasons that we now hold that damages in lieu of the WARN Act notice are to be calculated using on [sic] the number of work days within the violation period.

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[16] The number of examples demonstrating the inequitable effects of the "calendar-day" approach are seemingly never ending. For example, a similarly inequitable result is achieved if one full-time hourly-wage employee works eight hours per day, five days per week, while another full-time hourly-wage employee works ten hours per day but only four days per week. Under the calendar day approach, the first employee would be entitled to 480 hours worth of pay over a sixty-day violation period while the second employee would be entitled to 600 hours of pay, notwithstanding that each was paid the same wages, and worked the same number of hours per week.

C. Which Employees Are Entitled to Damages

Next, Dillard contends that the district court erred in determining which employees were "aggrieved employees"[17] because the court included certain employees who actually received sixty days notice of termination prior to their actual termination. To notify its employees of their termination dates, Dillard sent out three sets of notices. Because Dillard was unable to predict with absolute precision the number of employees needed during the transition period, the last two sets of notices provided the employees with a range of dates in which the termination would likely occur.[18] Although Dillard anticipated that the employees would be terminated within the estimated range of dates, in actuality, some of the employees continued working past the estimated termination dates such that they actually received the entire sixty days notice prior to termination. So, even though the original notice dates provided less than sixty-days notice, those employees who continued working had the benefit of full notice. The district court, however, determined that

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[17] The term "aggrieved employee" means "an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with [the WARN Act] did not receive timely notice either directly or through his or her representative as requires [sic] by [the Act]." 29 U.S.C. § 2104(a)(7) (Supp. 1993).

[18] Between April 21 and 28, 1989, Dillard informed certain affected employees that they would be laid off between May 9 and July 1. Notices were also issued on May 12 to a third group of employees informing the employees that they would be terminated between June 10 and July 8.

> in those instances where an employee was advised that he would be terminated between two set dates, and the earliest set date was less than 60 days from the date notice was received, the employer has failed to comply with the Act . . . even if . . . the employee was actually discharged more than 60 days from receiving notice. Notice that sets the earliest date an employee could be discharged, at less than 60 days from receipt of notice, by its very terms, fails to meet the requirements of the Act.

Carpenters Dist. Council, 778 F.Supp. at 312. The effect of the district court's ruling was that Dillard was required to pay damages to some employees who actually were afforded sixty days of notice as required by the WARN Act.

Dillard argues that the district court's interpretation is inconsistent with both the language and the purpose of the Act, and we agree. The WARN Act only requires that employers provide sixty days notice of any plant closing or mass layoff. 29 U.S.C. § 2102(a) (Supp. 1993); 20 C.F.R. § 639.1(a) (1989) (final regulations). As noted above, if an employee receives less than sixty days notice, then the employee is entitled to back pay for each day of the violation period. The violation period is comprised only of those "days after the shutdown or layoff in violation of [the WARN Act] and extends for the number of days that notice was required but not given." H.R. CONF. REP. NO. 100-576, 100th Cong., 2nd Sess. 1052 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2085. Thus, if an employee was provided with a range of possible termination dates, some before the sixty-day period ended and some beyond the sixtieth day, and the employee was terminated

beyond that sixty-day period, such that he actually worked throughout the entire notice period, then there is no violation period. Because there is no violation period, "back pay for each day of violation" would amount to zero damages. *See* 29 U.S.C. § 2104(a)(1)(A) (Supp. 1993). However, if that employee was actually terminated *within* the sixty-day notice period, such that the employee actually received less than the full sixty days notice, then the violation period would range from the actual date of termination until the end of the sixty-day notice period. In such a case, the employee would then be entitled to damages for "each day of violation." We hold, therefore, that those employees who actually received sixty days notice before their termination are not entitled to "back pay" damages.[19] Because we reverse the district court's

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[19] The employees argue that the second and third sets of notices, which provided a range of estimated termination dates, should be treated as *no* notice, rather than defective notice. They argue that under the final regulations, the range of estimated termination dates must be fourteen days or less, and because the range provided by Dillard greatly exceeded fourteen days, the notice provided amounted to no notice. *See* 20 C.F.R. § 639.7(b) (1989) (final regulations). We disagree. First, as the district court correctly noted, neither the regulations nor the Act itself addresses how the courts are to treat notices that are determined to be defective or inadequate. *Carpenters Dist. Council*, 778 F.Supp. at 312, n.16. As such, neither the Act nor the regulations suggest that defective notice is automatically to be treated as though no notice had been provided at all. Moreover, we are not persuaded that the regulations require such. Although the final regulations, which became effective on May 22, 1989, require that a range of estimated termination dates cannot exceed fourteen days, the interim regulations did not address the matter. *See* 20 C.F.R. § 639.7 (1988) (proposed regulations). Thus, at the time Dillard provided notice to its

holding with respect to the number of compensable days within the violation period and the number of employees who are entitled to damages, we must remand this case for a determination of damages consistent with this opinion.

D. Good Faith Reduction of Damages

Dillard argues that the district court abused its discretion by not reducing its liability because Dillard acted in good faith and reasonably believed that it had complied with the Act. Any assessment of an employer's

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employees, the proposed regulations were in effect, although the layoffs occurred after May 22, after the final regulations became effective. The employees argue, however, that the date of the layoffs, rather than the date of the notices, ought to determine which regulations applied to Dillard's notices. They rely upon a district court case, *Finnan v. L.F. Rothschild & Co.*, 726 F.Supp. 460, 463 (S.D.N.Y. 1989), in which the court was faced with a question far different from the question posed here. In *Finnan*, the employer terminated employees within the sixty-day period after the WARN Act was first enacted. Thus, the court was faced with the question of whether a layoff or plant closing that occurs within the first sixty days of the enactment of WARN was subject to the Act. In determining whether the Act applied at all, the court noted that the "language of the statute focuses on the closing or layoff as the affected event." *Id.* at 463. In the case at bar, we are faced with the question of when the proposed regulations versus the final regulations apply. The Department of Labor's regulations are designed to help employers determine when notice is required, what that notice should contain, and what constitutes a violation of the Act. Because the WARN Act focuses upon employer notification of employees concerning impending mass layoffs and plant closings, we find that the regulations in effect at the time the notices were provided controls.

good faith or grounds for its belief in the legal propriety of his conduct is necessarily a finding of fact, to be disturbed on appeal only if clearly erroneous. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 464 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1281. 55 L.Ed.2d 792 (1978).

The WARN Act states that

> [i]f an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated [the WARN Act] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for [in the Act].

29 U.S.C. § 2104(a)(4) (Supp. 1993).

In this case, after the damages issues were tried to the court, the district court held that no good faith reduction of damages was warranted. First, the court found that Dillard did not subjectively believe that it complied with the notice requirements of the Act. The court noted that there was evidence that at the time the WARN Act requirements were discussed with Dillard's legal advisors, Dillard knew that it was well within the sixty-day notice period based on the projected date of the layoffs, and Dillard conceded that it was not relying on the two exceptions to establish its qualification for a reduction in damages based on its good faith. Moreover, throughout the process of calculating the WARN Act damages, when faced with any arguable point of law, Dillard consistently

resolved any questionable issue in its favor. Dillard concluded, for example, that it could deduct from damages any vacation pay it already owed its employees, a conclusion that Dillard's own legal advisors characterized as "aggressive" or "on tenuous grounds." The district court concluded that at some point, Dillard's conclusions concerning the calculation of damages become objectively unreasonable, and as such, Dillard was not entitled to a "good faith" reduction in damages. Although we are mindful that Dillard was caught in a difficult position with respect to the notification requirements, and although we recognize that Dillard made significant WARN payments to a significant number of employees, we cannot say that the district court's refusal to reduce damages is clearly erroneous.

E. Prejudgment Interest

Dillard argues that the district court's award of prejudgment interest was improper. *See Carpenters Dist. Council*, 790 F.Supp. at 673-75. We disagree. As the district court noted, federal law governs the range of remedies, including the allowance and rate of prejudgment interest, where a cause of action, as in this case, arises out of federal statute. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 127, 94 S.Ct. 2157, 2164, 40 L.Ed.2d 703 (1974); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983 (5th Cir. 1991). Federal law provides, *inter alia*, that interest "shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a) (Supp. 1993); *see also Guidry v. Booker Drilling Co.*, 901 F.2d 485, 488 (5th Cir. 1990) (holding that when a federal court's jurisdiction is predicated upon a federal

question, § 1961 does not preclude the award of prejudgment interest). The determination of whether prejudgment interest should be awarded requires a two-step analysis: does the federal act creating the cause of action preclude an award of prejudgment interest, and if not, does an award of prejudgment interest further the congressional policies of the federal act. *Hansen v. Continental Ins. Co.*, 940 F.2d at 984 n.11; *Guidry v. Booker Drilling Co.*, 901 F.2d at 488. If prejudgment interest can be awarded under the two-prong test, whether such interest is awarded in any given case is within the court's discretion. *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 392 (5th Cir. 1989) *cert. denied*, 493 U.S. 821, 110 S.Ct. 79, 107 L.Ed.2d 45 (1989); *Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co.*, 546 F.2d 1144, 1144 (5th Cir. 1977).

In this case, the district court's award of prejudgment interest was not an abuse of discretion. First, the WARN Act does not preclude an award of prejudgment interest. Although § 2104(b) states that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter[,]" the Act also states that "[t]he rights and remedies provided to employees by this chapter are in addition to and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies. . . . " 29 U.S.C. §§ 2104(b), 2105 (Supp. 1993). Thus, the "back pay" remedy provided under § 2104, while the only remedy provided to employees under the WARN Act, does not preclude the award of prejudgment interest under 28 U.S.C. § 1961. Moreover, given our holding that back pay damages essentially are wages to

which employees would have received had proper notice been provided, an award of prejudgment interest furthers the congressional purpose behind the WARN Act – providing compensation to employees in lieu of proper notice such that the employees would be put in the same position as if the full sixty days notice had been provided. As the district court accurately detailed, prejudgment interest will fully compensate employees for the lost use of wages that should have been paid if an employer fails to provide adequate notice. Prejudgment interest will also provide an incentive for employers to settle meritorious claims of aggrieved employees quickly, fairly, and without unnecessary delay. *See Carpenters Dist. Council*, 790 F.Supp. at 674. Therefore, we hold that a trial court may, in its discretion, award prejudgment interest to aggrieved employees for the WARN Act violations. We further hold that the district court in this case did not abuse its discretion in awarding prejudgment interest.[20]

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[20] Dillard's chief argument against the award of prejudgment interest centers upon the district court's award of back-pay damages based upon the number of calendar days within the violation period. Dillard argues that the penalty effect of the calendar-day approach makes the WARN Act an inappropriate vehicle for prejudgment interest, since the purpose of such interest is to compensate the victim, rather than punish the wrongdoer. *See, e.g., Illinois Cent. R.R. Co. v. Texas E. Transmission Corp.*, 551 F.2d 943, 944 (5th Cir. 1977). In the light of the fact that we have reversed the district court's ruling concerning the use of calendar days rather than working days to calculate the amount of back pay owed each employee, thus, removing the penalty effect of the back-pay damage award, Dillard's point is essentially moot.

F. The "Bienville" Employees

In its cross-appeal, the employees contend that the district court erred in determining that certain employees who were terminated on May 9 were not entitled to WARN notice. These employees made up part of Holmes's corporate division, although they were not based in the "regular" corporate office in the Canal Street site.[21] Instead, because of space considerations, they were located some distance away from the Canal Street location in offices known as the "Bienville site." The district court held that the Canal Street corporate division and the Bienville site did not comprise a "single site of employment" under the WARN Act. Further, the district court held that "there were insufficient numbers of employees assigned to [the Bienville site] to [bring the Bienville site itself] within the Act." *Carpenters Dist. Council*, 790 F.Supp. at 667. As such, the district court held that those Bienville site employees were not entitled to notice of termination. The employees have appealed this decision, contending that the two offices constituted a "single site of employment" under the WARN Act.

As a preliminary matter, we must determine the standard of review to be applied. Neither Dillard nor the employees endorse a particular standard of review, and we have been unable to locate any existing case law on this particular WARN Act question. Upon reflection, we

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[21] At the same location on Canal Street were two "sites" of employment for, the purposes of the WARN Act: the Canal retail store and Holmes's corporate division. We are concerned here only with Holmes's corporate division.

conclude that the question of whether multiple work locations constitute a "single site of employment" under the WARN Act is a mixed question of fact and law. Federal Rule of Civil Procedure 52(a) prescribes the clearly erroneous standard for findings of underlying fact. Whether multiple locations constitute a "single site" under the WARN Act, however, is a legal conclusion to be drawn from the underlying historical facts. The underlying facts relevant to a determination of the "single site" issue in this case are largely undisputed, and as such, we have no occasion to apply the clearly erroneous standard. As a conclusion of law, however, the issue of whether the two employment locations constitute a "single site of employment" is reviewed *de novo* by this court. *Cf. Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442 (5th Cir. 1988). We now turn to the merits of the employees' argument.

Under the WARN Act, notice of mass layoffs or plant closings is required if there is a sufficiently large "plant closing" or "mass layoff" at a single site of employment. *See* 29 U.S.C. §§ 2101(a)(2) and (3) (Supp. 1993). If the threshold requirements are met, the employer is required to provide notice of termination to all affected employees at that "single site of employment," Although the statute itself does not define the term "single site of employment," the regulations promulgated by the Department of Labor provides some guidance. The proposed regulations stated that

> (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form

a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees form [sic] one building to another.

(3) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of town and which are managed by a single employer may be considered separate sites if they employ different workers.

(4) The term "single site of employment" may also apply to unusual organizational situations where the above criteria do not reasonably apply.

20 C.F.R. § 639.3(i) (1988) (proposed regulation). Dillard argued, and the district court held, that Holmes's corporate division at the Canal Street location and the employees at the Bienville site were two separate and distinct sites of employment under WARN. Specifically, the court noted that the two sites were several miles apart, that the personnel assigned to the Bienville site – those employees who performed construction facilities management, energy management and store planning –

performed functions different from the functions provided by the workers in the Canal Street corporate division. The court noted that although the Bienville site employees' payroll checks were issued from the Canal Street location, "this was an insufficient connection by itself to view the Bienville location and the Canal Street store as one site." *Carpenters Dist. Council*, 790 F. Supp. at 667.

On appeal, the employees contend that the Bienville site and the Canal Street corporate division were a "single site of employment" because the job functions of the Bienville employees were closely integrated with the job functions of the Canal Street corporate division. A complete review of the underlying facts leads us to agree with the employees' contention. The evidence before the district court demonstrated that up until 1980 or 1981, the Bienville site employees were housed along with all other corporate employees at the Canal Street corporate division office. As the corporate division grew, it could no longer be comfortably housed in the Canal Street corporate division offices. In an effort to relieve overcrowding in those offices, certain divisions – including construction facilities management, energy management, and store planning – were relocated to the Bienville site. Once moved to the Bienville site, those employees continued to perform precisely the same company-wide functions they provided when housed in the Canal Street location. The Bienville site employees remained integrated with the Canal Street corporate division after the move. The Bienville site had no support staff, and the Bienville employees continued to rely upon the support staff at the corporate division office. In spite of the move to the

Bienville site, the employees nevertheless considered themselves part of the corporate division, and Holmes continued to consider them corporate employees for payroll purposes. It is not irrelevant that the employees – precisely, like the Canal Street employees – were made redundant and lost their jobs directly because of the merger.[22] These factors lead us to conclude that the Bienville site and the Canal Street corporate division were merely one site of employment that was separated because of space considerations. In our view, this situation may be classified as "an unusual organizational situation" under the DOL regulations. *See* 20 C.F.R. § 639.3(i)(4) (1988) (proposed regulations). These employees were entitled to the WARN Act notice of termination, and, consequently, Dillard is liable for any damages associated with providing inadequate notice.[23]

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[22] It appears that Dillard also considered the Bienville site employees part of the Canal Street corporate division. Employees at both sites were terminated on May 9, the layoff letters sent to both sites specifically stated that the layoff was occurring as a result of the discontinuance of the corporate functions at the Canal Street store.

[23] It is unclear from the record whether the Bienville site employees received no notice of termination, or whether they received less than sixty days notice. On remand, the district court will be required to determine what notice, if any, each affected employee received, and to calculate damages accordingly.

G. Retroactive Application of Regulations

Finally, the employees in their cross-appeal argue that the district court erroneously applied final regulations retroactively to deny a former Holmes employee back pay damages in lieu of notice. The former Holmes employee, Mary S. Krajcer, was a retail buyer for Holmes. As a buyer, she worked a regular forty-hour week, and as a rule, she worked weekends only a few times a year while on buying trips. She had no administrative duties, and she earned $36,000 per year plus bonuses. On April 18, 1989, Dillard offered Krajcer a position as a merchandising manager in one of its retail outlets. That position would have placed her second in command at that location, requiring her to hire and fire personnel, open and close the store each day, and work some nights, every Saturday, and some Sundays. Although the base salary was comparable to her position with Holmes, Krajcer would not be eligible for bonuses, and she would be required to work longer hours. When Krajcer refused Dillard's offer, Dillard terminated Krajcer on May 9 without providing any advance notice of termination.

Before the district court, the employees argued that Krajcer should have been paid back pay damages in lieu of notice. The district court, however, held that Krajcer was not entitled to such damages because she refused Dillard's offer of employment as a merchandising manager. Essentially, the district court held that the position offered by Dillard did not amount to a "constructive discharge," and as such, her refusal to accept the new position amounted to a voluntary termination of employment, which does not require WARN notice. *Carpenters Dist. Council*, 790 F.Supp. at 669-70; *see also* 20 C.F.R.

§ 639.5(b)(2) (1989) (final regulations). In arriving at this determination, the district court applied the final regulations, which became effective on May 22, 1989, see 54 Fed. Reg. 16042-01 (1989), rather than the proposed regulations that were in effect at the time Krajcer was terminated. The proposed regulations required that the new job must be "substantially equivalent in terms of pay and working conditions." 20 C.F.R. § 639.5(b)(2) (1988) (proposed regulations). On the other hand, the final regulations merely required that "the offer of reassignment to a different site of employment not be deemed a 'transfer' if the new job constitutes a 'constructive discharge.' " 20 C.F.R. § 639.5(b)(2) (1989) (final regulations). Because administrative rules should not be construed as having retroactive effect unless their language requires that result, *see, e.g., Sierra Medical Ctr. v. Sullivan*, 902 F.2d 388, 392 (5th Cir. 1990), we hold that the district court erred in applying the final regulations. Therefore, without expressing any view as to the merits, we remand this matter to the district court to determine whether, under the interim rules, Krajcer is entitled to back-pay damages.

V

For the foregoing reasons, we AFFIRM the district court's ruling on the constitutionality of the WARN Act, the summary judgment in favor of Federal Insurance and Liberty Mutual, the finding that Dillard violated the WARN Act, the refusal to reduce damages for good faith, and the award of prejudgment interest. We REVERSE the district court's ruling that damages are to be calculated using calendar days, the decision that the Bienville site and the Canal Street corporate division were not a "single

site of employment," the finding that employees who were actually provided sixty days notice are entitled to damages because notice of termination contained a range of dates, and the retroactive application of regulation to employee Mary Krajcer. As a result, we REMAND this case to the district court with instructions to calculate damages in a manner consistent with this opinion. Because this opinion affects the amount of damages Dillard will be required to pay the employees, the district court should also reconsider the award of attorney's fees accordingly.

AFFIRMED in Part, REVERSED in Part, and REMANDED.

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, et al.

v.

DILLARD DEPARTMENT STORES, INC., D.H. Holmes Company Ltd., et al.

Stephen J. PLESCIA and Alan A. Endermann, for themselves and on behalf of all others similarly situated

v.

DILLARD DEPARTMENT STORES, INC. and D.H. Holmes Company, Ltd.

Civ. A. Nos. 89-3680, 89-3751.

United States District Court, E.D. Louisiana.

Aug. 29, 1991.

As Amended Oct. 17, 1991.

Former employees and their union brought action under the Workers Adjustment and Retraining Notification Act (WARN) for employers' failure to give 60 days' written notice of closings or layoffs that occurred after a corporate merger. On cross motions for partial summary judgment, the District Court, Ronald A. Fonseca, United States Magistrate Judge, held that: (1) the circumstances of the merger did not fall within the "faltering company" or the "unforeseeable business circumstances" exceptions to the 60-day notice requirement in the Act; (2) the liability for back pay was to be calculated on the basis of each day of the violation, not on the basis of the number of days or weeks that the employees would have worked during the 60-day notice period; (3) the employers were

not entitled to a credit or a setoff for severance pay that they were obligated to pay under an ERISA plan or for vacation pay that they were obligated to pay under Louisiana law; (4) although part-time employees were not to be counted in deciding "employer" status, the part-time employees were affected by closings and were entitled to notice; and (5) individual officers and directors of the employers could not be held liable.

Motions for partial summary judgment granted in part and denied in part.

William Lurye, Gardner, Robein & Urann, Metairie, La., and R. Monroe Garner, New Orleans, La., for plaintiff class.

J. Forrest Hinton and Stephen P. Beiser, McGlinchey, Stafford, Cellini & Lang, New Orleans, La., for defendant Dillard Dept. Store.

John W. Lindner II, Adams & Reese, New Orleans, La., for defendant Federal Ins. Co.

ORDER AND REASONS

RONALD A. FONSECA, United States Magistrate Judge.

These consolidated matters are brought pursuant to the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.* and involve a class action composed of "all former employees of either D.H. Holmes Co., Ltd. (Holmes) and or Dillard Department Stores, Inc. (Dillard) "who were involuntarily terminated

from employment between May 8, 1989 and August 9, 1989, as a result of the acquisition of Holmes by Dillard and who did not receive sixty (60) days written notice of said termination either personally or through their representative." Defendants are Holmes, Dillard, certain named corporate officers, and directors of the respective corporate defendants and Federal Insurance Company (Federal), indemnity insurer of the corporate officers. Federal has also been named as a third party defendant in connection with policy insuring acts of the fiduciaries of defendants' welfare plans.

The action arose as a result of the termination of class member employees on, and subsequent to May 9, 1989, the effective date of a merger between Dillard and Holmes. Plaintiffs claim that defendants, in violation of the provisions of WARN, failed to give them 60 day advance notification of their termination as an employee and did not pay them the prescribed damages mandated by WARN in lieu of adequate notification. Defendants, on the other hand, contend that they fell within one or more exceptions of WARN, excusing them from the requirement of furnishing a full 60 day notice of termination, and, alternatively, that all affected employees received the amount of damages that would be due them under WARN, assuming they received less than the required notification.

Before the Court are motions and cross-motions for summary judgment, plaintiffs' Motion to Strike the supporting affidavit of defendants' motion for summary judgment, defendant corporate officers' and insurer's Motions to Dismiss, and Federal's Motion for summary

judgment on cross-claim. We will discuss each in their order of consequence.

BACKGROUND

In 1988, as a result of steadily declining profits and revenues, Holmes, a long established retail department store headquartered in New Orleans, Louisiana, hired the firm of Kidder-Peabody, investment counselors, to seek a solution for its financial problems. Through its efforts, Holmes and Dillard entered into serious negotiations in the latter part of 1988 for the merger of the two corporations. A merger agreement was ultimately reached between representatives of the two parties which was approved by the respective Board of Directors of Dillard and Holmes on March 3 and 6, 1989. One of the conditions of the agreement was that no less than eighty percent (80%) of Holmes' stockholders vote to approve the merger. Preliminary to any vote by the stockholders however, the parties were required to furnish Holmes' stockholders a registration statement outlining the parties' respective financial conditions, which statement required the advance approval of the Securities and Exchange Commission (SEC).

The proposed registration statement was filed with the SEC on or about March 7, 1989.[1] The statement was approved by the SEC on April 10, 1989. Efforts had been

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[1] Three amendments to the registration statement, which are not relevant to our consideration herein, were filed with the SEC between the initial filing date and just prior to April 10, 1989.

made to have the SEC expedite its decision on the statement, however, prior to its ruling on April 10th, neither Holmes nor Dillard could anticipate when the decision would be forthcoming. Having received SEC approval, a Holmes' stockholder meeting was scheduled for May 9, 1989.

On April 19, 1989,[2] at the direction of Dillard personnel, Holmes notified employees assigned to both its Corporate Planning Division and warehouse facilities[3] that they would be terminated effective May 9, 1989, in the event the merger with Dillard was approved by Holmes' stockholders. A second notice was sent to certain "transitional" employees at the above two locations between April 21 and 28, 1989, informing them that they would be laid off between May 9 and July 1, 1989. Finally, a notice was sent on May 12, 1989 informing employees in the Canal Street retail store that they would be laid off between June 10 and July 8, 1989.[4]

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[2] WARN provides that employees actually receive 60 days notice before a plant is closed. The April 19th date, as well as other notice dates mentioned in this opinion unless identified otherwise, refer to the dates defendants prepared or sent the notices, and not the dates of receipt by the respective employees.

[3] Employees in Holmes Planning Division were physically located in a building on Bienville Street but were "assigned" to the Corporation's Canal Street department store for payroll purposes. The Elmwood and Riverbend warehouses were located in Harahan, Louisiana, a suburb of New Orleans.

[4] The employees were notified that the Canal Street store would be closed after they were terminated.

Some of the employees receiving the latter notice were discharged during that time frame, while the employment of the rest was extended to a period between July 8 and August 9, 1989.

As stated above, defendants, out of an abundance of caution, paid each affected employee an amount of wages that they determined would be due under WARN, assuming, but not admitting, that they were exempt from providing 60 days notification. Dillard developed a formula for payment which, according to its own interpretation of WARN, satisfied the penalty provisions of the Act. Under the formula, they construed the 60 day penalty period as set forth in § 2104(a)(1)(A) to be the actual number of work weeks within that period rather than 60 individual days. Dillard determined that this meant each employee not receiving any notice would be entitled to eight (8) weeks of pay. Relying on the provisions of § 2104(a)(2) of the act, Dillard further concluded that it could deduct from this amount (eight weeks of pay, or any portion thereof due), any severance or vacation pay that would be due and paid to the employee. Additionally, under defendants' interpretation of the Act, part-time employees are not "affected employees."

The parties to this action have consented to have this Magistrate Judge try the issues pursuant to 28 U.S.C. § 636(c). Separate trial dates have been set on the severed issues of liability and damages.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT[5]

In this motion, plaintiffs seek a partial summary judgment on liability, as to both full-time and part-time employees, contending that defendants failed to provide them 60 days notice before terminating their employment. Additionally, they contend that they did not receive sufficient payment upon termination as mandated by WARN.

Defendants oppose this motion on the basis: a) that WARN, due to the factual circumstances leading up to the merger in this matter, provides an exception to the requirement that they provide 60 days notice; b) that the officers and directors named as defendants herein are not liable under the Act;[6] and, c) the WARN Act is unconstitutional.

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[5] In opposition to plaintiffs' motion for partial summary judgment, defendants have raised, for the first time in this action, the issue of the constitutionality of the WARN Act. We question the procedural vehicle defendants have chosen to attack the validity of the Act since they have not raised the unconstitutionality of the Act as a defense in their answer nor have they filed a motion to dismiss this lawsuit on that basis. The immediate effect a ruling in defendants' favor on this point may be only to defeat plaintiffs' motion for summary judgment and not a dismissal of the action. We need not decide this procedural issue at present since we must pretermit a decision on the constitutionality of the Act pending the United States intervention in this action. 28 U.S.C. § 2403. See Minute Entry dated July 3, 1991.

[6] This issue will be addressed later in this opinion in connection with defendants' motion to dismiss these individuals from the suit.

Essentially defendants' opposition to plaintiffs' motion for partial summary judgment, with the exception of the claim that the Act is unconstitutional, is based, in several respects, on the meaning and interpretation of the Act's provisions.

Ordinarily, prudence would dictate that we refrain from considering the manner in which the Act should be interpreted until its constitutionally [sic] has been determined. However, much time and energy has already been expended by counsel for the parties and by the Court on the instant motions and separate trial dates on liability and damages are set respectively for the weeks of September 23 and October 21, 1991. It would be helpful to the parties, and the progress of this litigation, that they be made aware, as early as possible, of the interpretation we place on the provisions of WARN, assuming we find the Act meets constitutional muster, to enable the parties to proceed to trial on the issues resolved in the motions before us. Therefore, pursuant to FRCP Rule 56(d),[7] we

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[7] Rule 56(d) provides:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

enter the following findings of fact and conclusions of law which will be deemed established at trial in this matter.

The WARN Act, which became effective on February 4, 1989, is intended to provide protection to workers, their families and communities by prohibiting certain employers from ordering a plant closing or mass layoff until 60 days after notice of the layoff is given to the employees and/or their union. 20 C.F.R. 639.1.

The Act provides in relevant part:

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order –
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
>
> (2) to the State dislocated worker unit . . . and the chief elected official of the unit of local government within which such closing or layoff is to occur.

29 U.S.C. § 2102(a).

The Act defines "employer" as:

> any business enterprise that employs –
>
> (A) 100 or more employees, excluding part time employees; or

> (B) 100 or more employees who in the aggregate work at least 4000 hours per week (exclusive of hours of overtime).

29 U.S.C. § 2101(a)(1).

The Act defines "plant closing" as

> The permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

29 U.S.C. § 2101(a)(2).

Employers who violate the 60 day advance notice provision are liable to each aggrieved employee for back pay and employee benefits for the period of the violation. 29 U.S.C. § 2104(a).

Defendants admit that both Dillard and Holmes are "employers" under the WARN Act. (Defendants' response to plaintiffs' statement of facts, paragraphs 1 and 2). Additionally, defendants have not contested that the closing of several Holmes stores and/or warehouses constituted "plant closings" under the Act.[8] Therefore, at

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[8] Defendants contend that the Corporate Planning Division and Riverbend warehouse should be considered separate sites under the Act. They argue that due to the lack of requisite personnel assigned to these sites, their closings were not subject to the provisions of WARN. There exist disputed factual issues as to whether the aforementioned sites should in fact be considered as separate sites. We reserve our ruling on this issue until after trial.

least with regard to Dillard and Holmes, we find that the Act is applicable, and that 60 days notice should have been given to the terminated employees unless these defendants can set forth some basis which would justify failure to give advance notice under the Act.[9]

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[9] Holmes is only responsible for giving notice to those employees who were terminated on May 9, 1989, the effective date of the merger. Dillard is responsible for giving notice to employees laid off subsequent to that date. Section 2101(b)(1) of the Act provides in part:

> In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoffs . . . up to and including the effective date of the sale. After the effective date of the sale . . . the purchaser shall be responsible for providing notice for any plant closing or mass layoff. . . .

Viewed alone, this section appears susceptible to two different interpretations. One requiring the seller to provide notice before the effective date of sale for any layoff which would occur up to 60 days after the effective date of sale. The other interpretation being that the seller is responsible only for notice of layoffs occurring up to and including the date of sale, the buyer being responsible for notices of layoffs after the sale. However, when considered with § 2102, it is clear that the latter interpretation is the correct one. While we generally speak of WARN in terms of requiring that an employee be given at least 60 days notice before a layoff, § 2102 directs that "an employee [sic] shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice. . . ." Section 2102's direction is towards the employer who has the power and authority to order a plant closing. It is presumed that in the ordinary situation a seller does not retain that power past the date of sale. Additionally, if Congress intended the first interpretation above, the inclusion of the phrase "for any plant closing of mass layoff" in each of the two sentences delineating the obligations of the seller and buyer would be superfluous. While final regulations promulgated by the Department of Labor (Department) which became effective May 22, 1989 are in accord, 20 C.F.R. 639.4(c),

Defendants contend that they could not have given notice of the layoffs 60 days before they occurred because at that point it was not clear when and if any layoffs would occur. The anticipated store closings and layoffs were something that Dillard was planning to put into effect only in the event that the merger took place. Thus, defendants contend that because the merger was an uncertain event until the SEC approved the transaction (approval occurred on April 10), the notice could not have been given any earlier than it was given, April 19, 1989.

Additionally, defendants urge that it was not certain that Holmes' stockholders would approve the merger, thereby further complicating any efforts to provide advance notice of the layoffs.

Much time is spent in argument, on both sides, to convince the Court, on the one hand, that defendants could have furnished termination notices earlier than they did, and, on the other, that they were prevented from doing so due to the uncertainties listed above. However these arguments of the parties are only relevant if defendants qualify under one or more of the listed exemptions in the Act allowing for less than 60 days notice.

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notices were sent prior to the effective date of the regulations. We need not determine the effect of either the interim interpretations or final regulations regarding this issue since we reach our conclusion independent of either. Neither Holmes nor Dillard contends that the responsibility for giving notice in this case fell to one or the other. Holmes did in fact send out notices to employees terminated on the date of the merger.

The following exemptions are set out in the Act:

> (1) an employer may order the shutdown of single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.
>
> (2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.
>
> (B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.
>
> (3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.[10]

29 U.S.C. § 2102(b).

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[10] The requirement of providing a brief statement of the basis for reducing the notification period is specific and unambiguous. The Department of Labor, in both the interim and final regulations, states that the employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements required in a notice. 20 C.F.R. 639.9. The regulations restate the statutory requirement.

It is undisputed that the written notices which were given to defendants' employees did not contain any type of statement of why they were not being given 60 days notice of their impending layoff. See plaintiffs' motion, exhibits B and C. Plaintiffs contend that by not providing such a statement, defendants have left the employees guessing as to why the notice period was less than 60 days. They contend that now defendants are attempting to benefit from the omission by not being limited to the reasons given in the notice. Thus, plaintiffs contend that because defendants did not specifically state in the notices a basis for reducing the notice period, defendants are estopped from asserting that any exceptions are applicable.

Defendants, on the other hand, point out that the Department of Labor has stated that minor errors in notices will not be a basis for a WARN violation. 20 C.F.R. 639.7(a)(4). Moreover, they contend that the law should not be read to require that a "legal brief" accompany a notice to employees. Finally, defendants contend that plaintiffs have not been prejudiced by the failure of the notices to contain the reasons for the shortened notice.

We conclude that the failure of an employer to state in the notice the reason why the time period has been shortened results in a defective notice. It is unclear from the Act and regulations, however, what effect we are to give this defective notice. Since it constitutes at least *de facto* notice, would an employer who qualifies under one of the exemptions be precluded from claiming the exemption in the absence of genuine prejudice to the employee? We need not reach this question since that provision of the Act requiring the reason to be given in the notice only

has application if an employer qualifies for an exemption, which defendants herein do not.

We address first "the faltering company" exception.

The exception in the Act provides that:

> (1) an employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1).

Defendants contend that this exception is applicable to this case. They contend that the evidence shows that Holmes, prior to the merger with Dillard, was seeking additional capital, without which Holmes may not have been able to stay in business.

The evidence reveals that in February of 1989, the Whitney Bank cut off Holmes' $10 million line of credit, and that around the time notice of the May 9th layoffs would have been required (March 9th), Holmes was seeking capital to replace this line of credit. On March 15, 1989, Holmes obtained from American National Bank a $6.5 million line of credit. Additionally, American National Bank agreed to supply Holmes with an additional $3.5 million line of credit for the fall in the event

that the merger did not take place. See exhibits to plaintiffs' motion, Ammon dep. pp. 8-10, 25-26; exhibit A (Proxy statement) at page 12.

Defendants contend that Holmes believed that providing notice to employees on March 9th of potential layoffs may have affected American National Bank's willingness to extend the line of credit Holmes was seeking. See Defendants' exhibit 1, opinion of Price Waterhouse to the effect that a notice of possible termination before the merger was approved by the shareholders and before federal regulatory approval was obtained would have jeopardized Holmes' ability to obtain capital from American National Bank. Defendants also contend that the line of credit Holmes was seeking was essential to Holmes' business operation if the merger had not been completed. In addition, defendants cite deposition testimony to the effect that Holmes was afraid that giving early notice would cause Holmes' employees to be hired by other retailers. Schuler dep. pp. 39-41 (exhibit 1 to defendants' supplemental memorandum). Therefore, defendants contend that the "faltering company" exception applies.

The circumstances presented by Holmes do not appear to be the type contemplated by the "faltering business" exception. Although it is clear that Holmes was, in fact, seeking capital, this is not enough to show that the exception applies. Defendants would have to show that the capital that was sought would have enabled the employer to avoid the plant closing or postpone it. However, the entity seeking the capital, Holmes, was not the same entity which was planning the layoffs. The evidence clearly established that the decision to lay off employees and/or close stores was made by Dillard

and was dependent upon the actual merger taking place. See plaintiffs' exhibits, Johnston depos. at p. 58; Darr depos. at p. 54. Thus, the fact that Holmes was seeking capital was not directly related to the fact that employees were laid off. The failure of Holmes to have obtained the capital it sought may, perhaps, have required store closings or layoffs due to Holmes' financial condition; however, those speculative layoffs and plant closings are not at issue in this case.

It should be noted that under the exception, the employer must have been seeking capital which, if obtained, would have delayed or avoided the plant closings. However, here Holmes was successful in getting the capital it sought, but the plant closings nevertheless occurred as a result of the merger with Dillard's subsidiary.

In addition, even if this exception would apply to the May 9th layoffs, it would not apply to the Canal Street layoffs which occurred between May 9th and August 9th of 1989. Darr, Dillard's general counsel, admitted that Dillard was not a faltering company at that time and was not seeking capital at that time. Darr depos. p.p. 134-135, attached to plaintiffs' supplemental memorandum.

Neither Holmes nor Dillard qualify as a "faltering business" under the Act.

We next address the "unforeseeable business circumstances" exception which is defined in the Act as follows:

> (2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably

> foreseeable as of the time that notice would have been required. 29 U.S.C.A. § 2102(b)(2).

Defendants contend that this exception also applies to this case. They contend that although the merger was foreseeable in the sense that both Holmes and Dillard wanted it to take place and had negotiated to achieve its occurrence, the actual time the merger would take place was unforeseeable and unexpected because they did not know when the SEC would approve the transaction or whether or not the Holmes shareholders would approve the merger.

The evidence reveals that actual SEC approval for the merger did not take place until April 10, 1989, only nine days before the April 19th notices went out to the corporate employees and the warehouse employees. Moreover, there is deposition testimony to the effect that there is no time limit for the SEC to approve a transaction, and that no one could have predicted when approval would take place. See defendants' exhibits K and JJ (deposition testimony of Benham and Johnston).

Defendants contend that until SEC approval on April 10th, a closing date for the merger could not have been scheduled.

To fall within this particular exception, the Act requires that a "business circumstance(s)," which was not reasonably foreseeable "*caused* the closing or mass layoff." [Emphasis added]. The "business circumstance" which allowed (as distinguished from "caused") the layoffs of Holmes' personnel was the merger that occurred on May 9, 1989. Defendants emphasize in argument the lack of certainty as to when the SEC might have approved

the offering or whether Holmes' stockholders would eventually approve the merger, as the principal circumstances bringing them under the exception to the Act. These events in themselves, however, did not "cause" any layoffs, but were merely "links in a chain" of events leading up to the timing of a merger that was contemplated and sought by both defendants for approximately six months.

Further, the merger itself did not cause the layoffs, but merely provided Dillard the opportunity, albeit for economic reasons, to lay off employees. We do not interpret the Act as allowing a decision to lay off employees based on any economic factor, such as to merely reduce costs, to fall within the exception to the Act, but rather only those decisions based on unforeseeable business or economic circumstances that by their very nature necessitate or impel the closing of a plant.[11]

In viewing all of the exceptions in the Act together, it is obvious that Congress intended only that unusual, unexpected and significant events, beyond the control of the employer, would excuse him from furnishing the full 60 day notice.

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[11] It is somewhat anomalous to consider that had either the SEC failed to approve the statement or the stockholders voted against the merger, that none of the affected employees would have lost their jobs when they did. Holmes had sufficient funding to continue operation at least through the fall of 1989. One can only speculate under those circumstances when and if Holmes' employees would have eventually been terminated.

However, assuming ambiguity in the terms used in connection with the second exception, resort to the legislative history of the Act clears away any uncertainty as to the impelling economic basis required for this exception.[12]

The House Conference Committee report states, with regard to "Unforeseeable Business Circumstances," that:

> The Conferees recognize that there may be cases in which unforeseeable events necessitate a plant closing or mass layoff and it is not economically feasible to require the employer to give notice and wait until the end of the notice period before effecting the plant closing or mass layoff. For example, a natural disaster may destroy part of a plant; a principal client of the employer may suddenly and unexpectedly terminate or repudiate a major contract; or an employer may experience a sudden, unexpected

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[12] Both the interim interpretations and final regulations of the Labor Department are in accord with our interpretation. 20 C.F.R. 639.9(b). The final regulations of the Department of Labor appear to meet the criteria of "substantive rules" and, therefore, are entitled to the force and effect of law. *Chrysler Corporation v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979); *United States v. Harvey*, 659 F.2d 62 (5th Cir.1981). Somewhat troubling, however, may be attempting to apply the final regulations, which became effective May 22, 1989, to actions of defendants relating to WARN, which occurred prior to that date. Ordinarily, regulations would not be applied retroactively. However, considering the provisions of WARN in its entirety, defendants would not be prejudiced if we were to rely on the regulations in interpreting the Act. If any claimed ambiguity exists in the Act and defendants establish reasonable grounds for believing that the act or omission was not a violation of WARN, the Court may reduce the amount of liability of penalty.

> and dramatic change in business conditions such as price, cost, or declines in customer orders. In these situations, the employer is required to give notice as soon as the closing or mass layoff becomes reasonably foreseeable, but the employer is permitted to implement the proposed closing or layoff without waiting until the end of the full notice period.

1988 U.S. Code Cong. & Admin.News 2082.

Defendants do not qualify for the exemptions set forth in § 2102(b).

Compliance with the Penalty Provision of the Act

Defendants contend alternatively, that even if thy [sic] are found to have violated the notice requirements of WARN, plaintiffs have been paid all that is due them under the penalty provisions of the Act.

Those provisions are as follows:

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for –
>
> (A) back pay for each day of violation at a rate of compensation not less that the higher of – (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during

> the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.
>
> The amount for which an employer is liable under paragraph (1) shall be reduced by –
>
> (A) any wages paid by the employer to the employee for the period of the violation;
>
> (B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and
>
> (C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation. . . . § 2104(a).

The defendants calculated the payments that would be due under this provision of the Act by first assuming that the reference to 60 days meant the number of work-weeks falling within a 60 day period (eight weeks) and not 60 individual work days. After deducting from this eight-week period the amount of notice actually given an employee, they determined how much severance and vacation pay was due the employee and counted this amount as fulfilling their obligations under WARN's penalty provisions.

We find, however, that the time period for which penalty payments would be due are 60 individual work days and not the number of work weeks contained within a 60 day period. Additionally, it was improper for defendants to use severance and vacation pay as a setoff for payments required under WARN since payments of these items were required by law and would be due defendants' employees regardless of the applicability of WARN.[13]

Sixty Day Provision for Back Wages

WARN provides that as a penalty for failing to give adequate notice, the employee is entitled to "back pay for each day of violation." § 2104(a)(1)(A). Plaintiffs contend that defendants incorrectly calculated the number of days for which back pay was owned. Defendants determined that for the employees terminated on May 9, 1989, approximately eight weeks notice was required, and since three weeks notice was given, they determined that the employees were entitled to five weeks of back pay. The calculation for the other terminated employees was made in the same manner. Plaintiffs contend, however, that the employer's liability is not for each day of work missed but for each calendar day that notice is lacking. Thus, for example, plaintiffs contend that since the employees who were terminated on May 9 only received 20 days notice,

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[13] No reference is made by defendants to any attempt by them to include welfare benefits that were due under § 2104(a)(1)(B) in their computation of penalties that would be due under the Act.

they are entitled to 40 eight hour days of back pay, not five weeks of back pay.

One court has interpreted the Act's 60 day provision as the plaintiffs contend. In *United Electrical Radio & Machine Workers v. Maxim, Inc.*, 5 IER Cases 629 (D.Mass.1990), (a copy is attached as part of Exhibit 2 to plaintiffs' memorandum), the court calculated the employer's liability by determining that 64 employees had not been given notice and so multiplied 64 employees times 8 hours of work times $10.60 per hour, times 60 days, for a total of $325,632.00 owed in back pay for the workers. However, the method used by the court was not disputed, and thus was not an issue in that case. Therefore, that case is dicta as to the proper method for determining how to calculate the number of days for which back pay is owed.

Defendants contend that the WARN Act, as a remedial statute was intended to place the affected employees in the position they would have been in had no violation – in other words, if they had the full 60 days notice required by WARN. Thus, employees should be compensated for the actual number of days they would have worked during the period of the WARN violation. Defendants contend that to hold otherwise would convert WARN Act from a remedial statute into a punitive statute. Additionally, defendants point out that § 2104(a)(3) of the Act expressly provides for "civil penalties" in favor of local government. They contend that if Congress had intended the general back pay provisions applicable to all WARN employers to provide for back pay penalties, it would have expressly stated this intent.

We see nothing in the Act which supports defendants' interpretation. The liability provisions of the Act are clear, eliminating any need for a resort to outside sources to determine Congress' intent. "An employer . . . shall be liable . . . for *back pay for each day of violation*. . . . " § 2104(a)(1)(A). [Emphasis added.]

There is no rational explanation for inclusion in the Act of the phrase "for each day of violation" if Congress intended to limit an employee's recovery only to wages he would have earned during the period of the violation.

Severance Pay

Section 2104(a)(2)(B) provides that the amount for which an employer is liable may be reduced by any voluntary and unconditional payment to the employee that is not required by any legal obligation.

Plaintiffs contend that severance pay was required under the law, and, therefore cannot be credited against the payments required under the WARN Act.

Congress, in its Conference Report, stated with respect to the offset provisions of WARN that:

> payments owing because of written or oral agreement, and made on account of the employment loss, would not offset the back pay remedy. Such payments may include severance pay, pension benefits or any other kind of benefit that an employee is entitled to receive. These are benefits that are payable as compensation for past services because a layoff or shutdown has occurred, whether or not the terms of the layoff

> or shutdown actually violate the Act. In addition, they are benefits that an employee would not receive if employment had continued.

1988 U.S.Code Cong. & Admin.News at 2086.

It is undisputed that the severance pay due herein was computed with reference to the Bulletins attached to plaintiffs' memorandum as exhibits R and S, which provide that full time employees will be paid separation pay according to the schedule in the bulletin. Johnston (a Holmes' officer) stated in his deposition that any employee laid off or terminated without cause in any other situation would receive severance pay. Johnston deposition at p. 88. The Holmes' severance pay plan was adopted by Dillard in the merger. Exhibit A to plaintiffs' motion for summary judgment, at B 10.

Plaintiffs contend that Holmes' plan for payment of severance pay constituted an ERISA (Employee Retirement Income Security Act) plan. Under ERISA, an employee welfare benefit plan is defined to include:

> Any plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . unemployment, or vacation benefits, . . . or (B) any benefit described in Section 186(c) of this title. . . .

29 U.S.C. § 1002(1). Section 186(c) specifically lists severance benefits; thus, plans which provide severance benefits to employees are included in the definition of employee welfare benefit plan. Moreover, courts have

found severance pay plans to be ERISA plans. *See Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir.1985), cert. denied, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 6th Cir.1990), cert. denied, ___ U.S. ___, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990).

Defendants cite *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), for the proposition that one-time severance payments such as the ones that were made in this case, do not constitute an ERISA plan. However, that case merely held that a Maine statute which required employers to provide one time severance payments to employees in the event of a plant closing neither established nor required an employer to establish and maintain an ERISA plan; thus, the Maine statute was not preempted by ERISA. That case did not hold that an employer who establishes and maintains a plan for payment of severance benefits to its employees does not establish an ERISA plan.

Additionally, it should be noted that in an unrelated case in this Court, Holmes and Dillard admitted that the Holmes severance pay plan constituted an ERISA plan. In *Krajcer v. Dillard Dept. Stores and D.H. Homes*, CA No. 90-1015 (E.D.La.1990), plaintiff, a former Holmes' employee, sued Dillard and Holmes for their failure to pay her severance pay under the Wage Bulletin. In their answer to Krajcer's complaint, Dillard and Holmes stated that the severance pay plan entitled the employee to one week of salary for each year of service and further stated "that the severance pay plan was an employee welfare benefit plan covered by [ERISA]." Exhibit T to plaintiffs'

memorandum. Additionally, Holmes and Dillard stipulated in the pre-trial order in that case that it was an ERISA plan. Exhibit V to plaintiffs' memorandum.

Central to the Judgment rendered in favor of the plaintiff in *Krajcer* and to the Court's jurisdiction was that the severance plan, which was the identical plan involved in this matter, was a plan under ERISA.

In *MacMillan Bloedel, Ltd. v. Flintkote Co.*, 760 F.2d 580 (5th Cir.1987), the Fifth Circuit ruled that a court could take judicial notice of related proceedings and records, including pleadings and files in cases before the same court. *Id.* at 587. Therefore, plaintiffs request that this Court take judicial notice of the proceedings and pleadings in *Krajcer.* We conclude that defendants are collaterally estopped from contesting that their severance pay plan was an ERISA plan.

A party may be collaterally estopped from re-litigating an issue determined in a prior judgment under the following conditions: "(1) That the issue at stake be identical to the one involved in their prior litigation; (2) that the issue has been actually litigated in the prior litigation; and, (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action." *Wehling v. Columbia Broadcasting System*, 721 F.2d 506, 508 (5th Cir.1983); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir.1981); *McDuffie v. Estelle*, 935 F.2d 682 (5th Cir.1991). Offensive use of collateral estoppel is recognized, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), and complete identity of the parties in both suits is not essential. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66

L.Ed.2d 308 (1980). In *McDuffie*, the Court appears to add an additional factor to be considered before applying estoppel, which is, that no special circumstances exist that would render preclusion inappropriate or unfair.[14]

Krajcer involved a claimed entitlement to severance pay under Holmes' (Dillard) ERISA plan. The administrator of the plan had determined that plaintiff's failure to accept another job position in lieu of termination resulted in her forfeiture of severance pay. The District Judge found the administrator's interpretation to be erroneous and awarded judgment to plaintiff.

The issue in *Krajcer* is identical to the issue before us, i.e., whether defendants' severance pay falls under an ERISA plan. An opportunity to fully litigate the issue was present in *Krajcer* . Defendants did not dispute that the severance pay plan was covered by ERISA , rather they judicially admitted that it was. The determination of the issue in *Krajcer* was a critical and necessary part of the judgment, not only in that the judgment was based on an interpretation and application of the law governing ERISA plans, but that the plan under consideration was acknowledged to be an ERISA plan. The very jurisdiction of the Court was bottomed on the ERISA statute. We perceive no special circumstance which would have provided a disincentive to defendants not to have vigorously litigated the issue of whether the plan was an ERISA plan, in the prior litigation.[15]

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[14] *McDuffie*, at 684-85.

[15] *Krajcer* is presently pending on appeal. However, regardless of its outcome, the factors justifying the application of collateral estoppel would not be changed.

One of the fiduciary duties of the administrator of an employee welfare benefit plan under ERISA is to administer the plan in accordance with its plain terms. 29 U.S.C. § 1104(a)(1)(D). Therefore, since the severance pay plan (the bulletin) clearly provides that employees terminated without fault were entitled to separation pay, the payment of severance benefits to the terminated employees was required by ERISA. Thus, those payments may not be credited to the payments required under WARN since WARN allowed a set off for voluntary and unconditional payments not required by any legal obligation.

Vacation Pay

Plaintiffs contend that vacation pay is also not a permissible credit against the payments required by WARN because these payments were required by law.

The Holmes bulletins (also included in Exhibits R and S to plaintiffs' memorandum) provided, with regard to vacation pay, that:

> When an employee resigns or is terminated for any reason, he will be paid for unused vacation according to the following schedule. Whether or not an employee was terminated for cause is immaterial. If his length of service entitles him to vacation time and there is some unused vacation remaining, he must receive the equivalent amount of time in pay. . . .

The Supreme Court has stated that unlike severance pay, a plan to pay employees for unused vacation time out of the general assets of the corporation was not an ERISA

plan. *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989).

However, Louisiana law states that an employee upon discharge or resignation shall be paid "the amount then due under the terms of employment" within three days. La.Rev.Stat. § 23:631. Louisiana jurisprudence has interpreted the definition of "amounts due under terms of employment" to include vacation benefits. *Draughn v. Mart*, 411 So.2d 1188, 1190 (La.App. 4th Cir.), *writ denied*, 415 So.2d 944 (La.1982); *Morris v. Parish Radio Service Co.*, 444 So.2d 162 (La.App. 1st Cir.1983); *Tompkins v. Schering Corp.*, 441 So.2d 455 (La.App. 2d Cir.1983); *Blankenship v. Southern Beverage Co.*, 520 So.2d 440 (La.App. 1st Cir.1988); *writ granted*, 522 So.2d 574 (1988), dismissed on joint motion; *Potvin v. Wrights Sound Gallery, Inc.*, 568 So.2d 623 (La.App. 2nd Cir.1990). Thus, plaintiffs contend that since defendants were required by law to pay the terminated employees for their unused vacation time as set forth in the bulletin, the payment of vacation benefits cannot be credited toward the payments required under WARN. *See Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292, 1301 (E.D.Tenn.1990) (employer not entitled to a credit for vacation pay which it was legally obligated to pay under the terms of the employer's policies and procedures manual and state law). Defendants, therefore, improperly credited vacation pay benefits against WARN benefits.

Defendants contend that the question of the sufficiency or insufficiency of the payments made to the terminated employees should not be decided on a motion for summary judgment. They contend that the documents signed by the employees at the time of their termination

did not specify or itemize the amounts that were being paid as supplemental WARN pay; thus, they contend that it is impossible to determine how much of the amount paid to each employee was for severance pay, vacation benefits, or supplemental WARN pay.

However, although such a dispute may preclude the Court at this time from determining exactly how much the defendants owe to each of the terminated employees, it does not preclude the Court from determining whether or not, as a matter of law, severance pay and/or vacation pay may be credited against the payments required by WARN.

Employees Entitled to Damages

The Court has defined as class plaintiffs in this action:

> . . . all former employees of D.H. Holmes Co., Ltd. (Holmes) and/or Dillard Department Stores (Dillard) who were involuntarily terminated from employment between May 8, 1989 and August 9, 1989, as a result of the acquisition of Holmes by Dillard and who did not receive sixty (60) days written notice of said termination either personally or through their representative. . . .

The amount of damages each plaintiff would be entitled to recover however depends on the period of notice actually received by that employee. The class definition, however, does not specifically address those employees whose notices indicated they could be terminated within a certain time frame and that either the last date of possible termination contained in the notice, or the date

that the employee was actually discharged, was at least 60 days from the date notice was received. A determination must be made whether employees who fall in that category are to be considered members of the class.

We conclude that in those instances where an employee was advised that he would be terminated between two set dates, and the earliest set date was less than 60 days from the date notice was received, the employer has failed to comply with the Act. This is so even if the latest set date was at least 60 days from the date notice was given, or the employee was actually discharged more than 60 days from receiving notice. Notice that sets the earliest date an employee could be discharged, at less than 60 days from receipt of notice, by its very terms, fails to meet the requirements of the Act.[16]

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[16] The permanent regulations defines the term "date" as " . . . a specific date or to a 14-day period during which a separation or separations are expected to occur." 20 C.F.R. 639.7(b). The regulations further state that where the 14-day period is used, the first day of the period must fall at least 60 days from the date of the notice. The interim regulations contained no similar provision. In reaching the conclusion above, we do not resort to either the permanent regulations or its predecessor, as we determined whatever effect they would have in the instant case, neither would be applicable to the situation herein presented. These regulations only define what notices comply with the 60 day requirement in the Act. As we determined above, the starting date of a period during which an employee could be discharged, which is less than 60 days from the date of notice, does not constitute the notice required under the Act. The regulations do not address how the courts are to treat notices determined to be inadequate.

However, we do not believe that notification, which is inadequate solely because it might provide for termination earlier than 60 days, should be considered as no notice at all. As to those employees who were given conditional notices, actual notice will comprise the number of days between the date notice was received and the first date which an employee was notified he could have been discharged, whether or not he was discharged at a later date.[17]

By the same token, those employees whose termination dates may have been extended, and were actually terminated more than 60 days from date of notice would nevertheless be entitled to damages under the Act for the period from the earliest termination date that they were notified they could be terminated. Maintaining employees on the payroll past dates set forth in an inadequate notice does not cure or convert the inadequate notice into one that is adequate. Any salary or other benefits earned by an employee during the extended period could of course be credited against any damages found to be due.

Defendants' Motion for Partial Summary Judgment

Defendants contend that the affidavit of Allen Williams, Dillard's director of employee services, along with

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[17] If the facts reflect that an employee was discharged before the earliest date contained in the notice, then the defendants would only be entitled to a credit from the date of notification to the date of discharge.

the exhibits to that affidavit, demonstrate that the following groups of former Holmes employees should be dismissed from the class: 1) part-time and extra on call employees because they were not Dillard's employees within the meaning of the WARN Act; 2) employees who actually received the 60 days notice required under the Act; 3) employees of Holmes' Riverbend Warehouse facility, the employees of which were not entitled to notice because less than 50 employees from that site were laid off; and 4) employees of the Holmes Store Planning Department, again because less than 50 employees from that site were laid off.

Defendants also contend that they are entitled to summary judgment as to the claims against the individual defendants (officers and directors of Dillard and of Holmes)[18] because these defendants are not employers within the meaning of the WARN Act.

Defendants' motion is denied in part, insofar as it seeks to dismiss, as class plaintiffs, employees at the Riverbend Warehouse, the Planning Department and those employees who actually received 60 days notice.

The definitions of both "plant closing" and "mass layoff" require that at least 50 employees be laid off at a "single site of employment." § 2101(a)(2) and (3). There is insufficient evidence before us to enable us to determine if Riverbend and the Bienville (Planning Department)

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[18] William Dillard, II, Alex Dillard, James E. Darr, Jr., John Hawkins, James I. Freeman, Roy Grimes, Chuck Franzke, Mike Bowen, Jim Wilson, Allen Williams, Donald W. Johnston and James E. Ammon.

locations meet the definition of a "single site." Therefore, a decision on this issue will be pretermitted until trial on the merits.

Employees who actually received 60 days notice are already excluded from this suit under the definition of those who comprise the class membership. However, in light of the conclusions of law set forth elsewhere in this opinion, it would appear that those individually named employees in defendants' motion have not received 60 days notice and have not been fully compensated under the terms of the Act. Therefore, summary judgment as to them would be inappropriate.

Part-Time Employees

Defendants contend that among the Canal Street store employees terminated were 67 part time employees who worked less than 20 hours per week and 12 employees classified as "extra on-call" because they did not work a regular schedule and would be called to work less than 20 hours per week on an as-needed basis. Williams' affidavit, paragraphs 10 and 11. In addition, they contend that 20 employees at the Canal Street store had been employed at that location for less than six months prior to the time they received notice that they would be laid off. Williams' affidavit, paragraph 12. Defendants contend that these employees are all considered to be part-time employees under the Act, and, as such, did not become Dillard employees at the time of the merger; therefore, they were not entitled to notice by Dillard.

Under the WARN Act, the term "part-time" employee" means an employee who is employed for an

average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required. § 2101(a)(8). Thus, defendants are correct in contending that the Canal Street employees who worked less than 20 hours per week or who were employed for less than six months are part-time employees under the Act. In addition, the Act provides, in pertinent part, that the term "employer" means "any business enterprise that employs-(A) 100 or more employees, excluding part-time employees . . . " Thus, under the Act, part time employees are not considered in determining whether a company is an "employer" within the meaning of the Act.

However, under the Act, part-time employees are affected employees who are entitled to notice of a mass layoff or plant closing under the Act. The Act requires an employer to give such notice to each "affected employee." § 2102(a). "Affected employee" is defined in the Act to mean "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." § 2101(a)(5). Part-time employees are not specifically excluded under this definition. If Congress intended that they not be covered under the Act, it would have been easy to have excluded them under the definition, as they had been excluded in other parts of the Act. Therefore, under the Act, part-time as well as full-time employees may be affected employees entitled to notice.[19]

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[19] Both the interim and final regulations promulgated by the Department of Labor provide that "while part-time employees are not counted in determing whether plant closing

Defendants nevertheless contend that the part-time employees were not entitled to notice by Dillard, relying on Section 2101(b)(1) of the Act, which provides that:

> In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff . . . up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff . . . *Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.*

§ 2101(b)(1). [Emphasis added]. Defendants contend that under this provision, at the time of the merger, only full time employees became the employees of Dillard; part-time employees did not. Therefore, since the part-time employees were not the employees of Dillard, Dillard was not required to give them notice of a plant closing or mass layoff.

Plaintiffs, on the other hand, contend that defendants' interpretation of this provision leads to absurd results. They contend that, taken to its conclusion, that interpretation would mean that if Dillard hired someone as a part-time employee on May 10, the day after the merger, and the new part-time employee was laid off on July 15 as part of the Canal Street store closing, the new

---

or mass layoff thresholds are reached, such workers are due notice." 20 C.F.R. 639.6(b).

employee would be entitled to notice; however, someone who had been a Holmes part-time employee prior to the merger would not be entitled to notice. Plaintiffs contend that this is an illogical result. They contend that instead, the Act should be interpreted to mean that Holmes' full-time employees remained full-time employees after the merger, while part-time employees remained part-time employees.

Plaintiffs additionally contend that the last sentence of Section 2101(b)(1) was added because otherwise, every time part or all of a business was sold, the employees would suffer an "employment loss" within the meaning of the Act and the seller might be required under the Act to give 60 days notice despite the fact that the purchaser would retain the employees as the purchaser's employees. Plaintiffs contend that to avoid this result, the last sentence of Section 2101(b)(1) was added to provide that the seller's full-time employees would automatically become the purchaser's full-time employees; therefore, notice would not be required if employees were not actually terminated. Plaintiffs point out that if the Act did not contain this provision that full-time employees would automatically become the full-time employees of the purchaser, then once Dillard continued their employment, all of the employees would be part-time employees for six months because they would have been employed by Dillard for less than six months. Thus, during the first six months after the purchase, Dillard could terminate any and all employees and not be required to give anyone notice, since plant closings and mass layoffs require the termination of 50 or more employees excluding part-time employees. Plaintiffs contend that the last sentence of

2101(b)(1) was designed to close this loophole by providing that the employment of full-time employees would be continuous.

We conclude that plaintiffs' analysis of the above provision to be the correct one. We find that part-time employees are affected employees under the Act entitled to notice.

A decision as to whether the "extra on call" employees could be considered "affected employees" is difficult considering the present state of the record. Whether they are "affected employees" would depend on each of those employees' individual situations both before and after the merger. We reserve our ruling on these individuals until after trial on the merits.

Liability of the Individual Defendants

In this suit, plaintiffs have not only sued Dillard and Holmes for failure to give adequate notice under the WARN Act, but have also sued various officers and/or directors of Holmes and/or Dillard. Defendants contend that the individuals are not "employers" under the WARN Act, and thus are not liable under that Act.

As noted above, the WARN Act defines "employer" as:

> any business enterprise that employs – (A) 100 or more employees, excluding part time employees; or
>
> (B) 100 or more employees who in the aggregate work at least 4000 hours per week (exclusive of hours of overtime).

§ 2101(a)(1). The Act does not define "business enterprise."

With regard to the definition of "employer" and the meaning of the term "business enterprise" under the Act, the Department of Labor, in its interim regulations, has stated as follows:

> Commenters have raised a range of interpretative issues having to do with the meaning of the term "business enterprise" and the form of a business organization. These include whether and to what extent subsidiaries which are wholly or partially owned by a parent company are separate employers for the purpose of WARN, and to what extent independent contractors can be considered separate from their business clients. Questions have been raised regarding coverage of non-profit organizations, and public and quasi-public organizations which perform commercial work.
>
> In response to questions raised, it appears that there are conditions under which all of these entities can be considered as "employers" within the meaning of the Act. In developing general principals for its regulations, DOL will look for guidance to the existing statutes such as the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), the Employee Retirement Income Security Act (ERISA) and interpretations thereunder.

53 Fed.Reg. 43731 (1988).[20]

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[20] The final regulations merely restate the statutory language. 20 C.F.R. 639.3(a).

The Fair Labor Standards Act (FLSA) requires every employer who is engaged in commerce or who is employed in an "enterprise" engaged in commerce to pay employees certain rates. 29 U.S.C. § 206(a). The FLSA defines "enterprise" to mean "the related activities performed (either through unified operations or common control) by any person or persons for a common business purpose. . . . " 29 U.S.C. § 203(r). Additionally, FLSA's definition of "employer" includes "any person acting directly or indirectly in the interest of an employer." Thus, the FLSA has been interpreted to apply to corporate officers who are responsible for managing the corporation's day-to-day affairs. *See Donovan v. Sabine Immigration Co., Inc.*, 695 F.2d 190, 194-95 (5th Cir.1983), cert. denied, 463 U.S. 1207, 103 S.Ct. 3537, 77 L.Ed.2d 1387 (1983), (individual who effectively dominates a corporation's administration or otherwise acts, or has power to act, on behalf of the corporation vis-a-vis its employees is an employer under FLSA); *Marchak v. Observer Publications, Inc.*, 493 F.Supp. 278, 282 (D.R.I.1980) ("officers of corporations are routinely held to be 'employers' within the meaning of the FLSA and thus proper parties in actions for unpaid wages and overtime compensation.")

Plaintiffs contend that the definitions contained in and interpretations of the FLSA are relevant in interpreting the WARN Act, and that this Court should therefore conclude that officers and directors of a corporate employer are also employers within the meaning of that Act.

The FLSA is not the only federal statute which governs the activities of "employers" and defines that term to include individuals as well as businesses. For example,

Title VII of the Civil Rights Act and the Age Discrimination in Employment Act each define "employer" to include "a *person* engaged in an industry affecting commerce . . . " 42 U.S.C. § 2000e; 29 U.S.C. § 621.

However, simply because other statutes involving employers have defined that term to include individuals does not necessitate a finding that the corporate officers and directors in this case can be held liable under the WARN Act. Congress would have been aware of the definitions contained in those other statutes, and that the failure to specifically define "employer" to include individuals as well as business entities would appear to represent an intent that only business entities, not individuals, be included as "employers" under the WARN Act.

The House Conference Committee report discussed the definition of "employer", stating that:

> *"Employer"*. The Conference Agreement retains the Senate Amendment language that the term "employer" means a business enterprise. The Conferees intend that a "business enterprise" be deemed synonymous with the term company, firm or business, and that it consists of one or more sites of employment under the common ownership or control. For example, General Motors has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but as provided in the Bill, there is only one "employer" – General Motors.

1988 U.S.Code Admin.News 2078, 2079. This language supports a conclusion that the definition of employer in

the WARN Act was not intended to include offices and directors of a corporate employer.

In interpreting a statute, the starting point for courts is the actual language employed by Congress in the statute. *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 110 S.Ct. 462, 107 L.Ed.2d 462 (1989); *Sutton v. U.S.*, 819 F.2d 1289 (5th Cir.1987). Where the langauge is unclear, resort to the legislative history may be necessary to determine Congressional intent. *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

In this case, the language of the WARN Act, defining "employer" as a "business enterprise" that employs a certain number of people, suggests that only business entities, not officers and directors of corporate employers, should be considered as employers under the Act. This interpretation is consistent with the House Conference Committee report, quoted above, which states that "business enterprise" was intended to be synonymous with the term company, firm or business. Such a reading would not produce incongruities in the language, nor would it clearly be contrary to the purpose of the statute. The fact that such an interpretation would be inconsistent with the way other statutes have defined the term "employer" does not mean that such an interpretation is wrong, especially considering the fact that Congress could have utilized the same definition in WARN as it used in other statutes but did not do so. Thus, the individual officers and directors of Holmes and Dillard who have been made defendants herein are entitled to summary judgment dismissing them from this action.

Federal Insurance Company's Motion to Dismiss

Federal Insurance Company (Federal) issued a policy wherein it agreed to indemnify Holmes' officers and directors for amounts the officers and directors may become legally obligated to pay as a result of claims against them. In view of our determination that the individual corporate officers are not liable under WARN, Federal is entitled to be dismissed from this suit.

Plaintiffs' Motion to Strike Affidavit

Plaintiffs' request that the affidavit of Allen Williams, which was submitted in support of defendants' motion for partial summary judgment, be stricken. Williams' affidavit attempts to establish a basis for defendants' contention that certain employees were in fact terminated more than sixty days from the date they intially received notice and to list part-time and "extra on call" personnel.

Plaintiffs urge several reasons in support of their motion, including that records Williams relied upon were essentially unreliable. We need not address the issues raised by plaintiffs since their motion is moot in view of our denial in part of defendants' motion for partial summary judgment.

Federal's Motion for Summary Judgment

Defendants[21] filed a cross-claim against Federal seeking indemnity under two fiduciary liability policies

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[21] Dillard, Holmes and individual corporate officers.

issued by Federal, which defendants allege covers damages plaintiffs may recover from them. Federal has filed a motion for summary judgment contending that the policy at issue, by its terms, limits recovery to a breach of a fiduciary duty under an Employee Benefit Plan. Federal argues that any damages plaintiffs would be entiteld to recover in this action arise as a result of a violation of WARN and not because of any breach of duty imposed on an administrator of an ERISA plan. Defendants disagree, alleging that language in plaintiffs' Second Amended Complaint[22] raises ERISA related claims which would be covered under the policy.

Federal has attached copies of its policies as exhibits to its motion. The insuring clause appearing on page two of each policy contains the following language:

> The company shall pay on behalf of each insured all losses that an insured becomes legally obligated to pay because of any claim first made against an insured during the policy period or the extended reporting period for a wrongful act committed or attempted, or allegedly committed or attempted, before or during the policy period of an insured or by any person for whose wrongful acts an insured is legally responsible.

The term "wrongful act" is defined in the policies as follows:

---

[22] Plaintiffs seek benefits for each aggrieved employee under an employee benefit plan, including the cost of medical expenses incurred during the employment loss which would have been covered under the employee benefit plan if the employment loss had not occurred.

(1) With respect to a sponsored plan,

(a) Any breach of the responsibilities, obligations or duties imposed upon fiduciaries of a plan by the Employer Retirement Income Security Act of 1974 or its amendments or by the common or statutory law of the United States, or any state or other jurisdiction;

(b) Any other matter claimed against the sponsor organization or an insured person solely because of the insured person's service as a fiduciary of any sponsored plan; and,

(c) Any negligent act, error or omission in the administration of any sponsored plan; and,

(2) With respect to an insured plan, (d) Any negligent act, error or omission in the administration of any insured plan.

Listed among damages an affected employee may recover for a violation of WARN are " . . . benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not incurred."

Viewing the policies in their entirety, we conclude that their terms are not ambiguous and that they provided coverage essentially for any breach of a fiduciary duty in connection with an employee benefit plan under duties and responsibilities imposed by " . . . the Employee Retirement Income Security Act of 1974 or its

amendments or by the common or statutory law of the United States, or any state or other jurisdiction."

Plaintiffs seek no relief against defendants under ERISA or any other statute or law which imposes duties, obligations or responsibilities on fiduciaries in the administration of employee benefit plans. They are seeking relief for a violation of WARN which happens to include as a category of damages, ERISA benefits that would have been due an employee had he remained employed during the 60 day notice period. WARN imposes no additional duties or obligations on an administrator of an ERISA plan, rather it imposes an obligation on an employer (business enterprise) to pay this category of damages.[23] Federal is entitled to summary judgment on its motion.

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[23] During oral argument on those motions, counsel was uncertain whether Holmes and Dillard themselves were considered administrators of their respective ERISA plans or had appointed individual fiduciaries to those duties. An answer to this question is not necessary to determine the outcome of the motion before us. If an employer happens to be the responsible fiduciary under a plan, the duty to pay the additional benefits for a violation of WARN is placed on the employer as "employer" and not as fiduciary of a plan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL

versus

DILLARD DEPARTMENT STORES, INC., ET ALS

CIVIL ACTION

NUMBER 89-3680 c/w 89-3751

SECTION "L" (4)

AMENDED JUDGMENT

(Filed May 4, 1992)

It having been brought to the Court's attention that certain defendants were inadvertently omitted, due to clerical error, from the judgment entered herein on April 21, 1992, the judgment entered on April 21, 1992 is hereby amended to read as follows:

Considering the Order and Reasons entered herein on August 30, 1991,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Federal Insurance Company, William Dillard, II, Alex Dillard, James E. Darr, Jr., John Hawkins, James I. Freeman, Roy Grimes, Chuck Franzke, Mike Bowen, Jim Wilson, Allen Williams, Donald W. Johnston, and James E. Ammon, and against plaintiffs, Carpenters District Council of New Orleans and Vicinity, International Brotherhood of Electrical Workers Local 130, International Union of Operating Engineers Local 406, Robert Graves, Martin N.

Ludwig, Sr., Donald J. Ludwig, Melvin Boe, Alcide Boudreaux, Albert Castaneda, Edward P. Gebhardt, Jr., Florian J. Lizana, III, Warren L. Minter, Dalbert Perron, Kenneth Smith, Stephen J. Plescia, Allen A. Endermann and members of the plaintiff class, dismissing plaintiffs' claims against these defendants, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant, Federal Insurance Company, and against defendants, D. H. Holmes Company, Ltd. and Dillard Department Stores, Inc., dismissing defendants' cross-claim against Federal Insurance Company, and,

Considering the Minute Entry entered herein on September 19, 1991,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of third-party defendant, Liberty Mutual Insurance Company, and against defendants and third-party plaintiffs, D. H. Holmes Company, Ltd. and Dillard Department Stores, Inc., dismissing the third-party claim against Liberty Mutual Insurance Company, and,

Considering the Order and Reasons entered by this Magistrate Judge in the above-captioned cases,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of plaintiffs, Carpenters District Council of New Orleans and Vicinity, International Brotherhood of Electrical Workers Local 130, International Union of Operating Engineers Local 406, Robert Graves, Martin N. Ludwig, Sr., Donald J.

Ludwig, Melvin Boe, Alcide Boudreaux, Albert Castaneda, Edward P. Gebhardt, Jr., Florian J. Lizana, III, Warren L. Minter, Dalbert Perron, Kenneth Smith, Stephen J. Plescia, Allen A. Endermann and members of the plaintiff class, and against defendants, D. H. Holmes Company, Ltd. and Dillard Department Stores, Inc., in the amount of $1,262,050.10, together with prejudgment interest at the rate of 8.85% from June 1, 1989 to date of judgment and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Amended Judgment be entered nunc pro tunc as of April 21, 1992, the date the original judgment was entered in this case.

New Orleans, Louisiana, this 4 day of May, 1992.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL

versus

DILLARD DEPARTMENT STORES, INC., ET ALS

CIVIL ACTION

NUMBER 89-3680 c/w 89-3751

SECTION "L" (4)

JUDGMENT

(Filed April 21, 1992)

Considering the Order and Reasons entered by this Magistrate Judge in the above-captioned cases,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of plaintiffs, Carpenters District Council of New Orleans and Vicinity, International Brotherhood of Electrical Workers Local 130, International Union of Operating Engineers Local 406, Robert Graves, Martin N. Ludwig, Sr., Donald J. Ludwig, Melvin Boe, Alcide Boudreaux, Albert Castaneda, Edward P. Gebhardt, Jr., Florian J. Lizana, III, Warren L. Minter, Dalbert Perron, Kenneth Smith, Stephen J. Plescia, Allen A. Endermann and members of the plaintiff class, and against defendants, D. H. Holmes Company, Ltd. and Dillard Department Stores, Inc., in the amount of $1,262,050.10, together with prejudgment interest at the rate of 8.85% from June 1, 1989 to date of judgment and for all costs.

New Orleans, Louisiana, this 21 day of April , 1992.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States
Magistrate Judge

DATE OF ENTRY APR 21 1992

Supreme Court, U.S.
FILED
JUL 22 1994
OFFICE OF THE CLERK

No. 93-1857

In The

Supreme Court of the United States

October Term, 1993

CARPENTERS DISTRICT COURT OF NEW ORLEANS AND VICINITY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 130; AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406; ROBERT GRAVES, MARTIN N. LUDWIG, SR., DONALD J. LUDWIG, MELVIN BOE, ALCIDE BOUDREAUX, ALBERT CASTANEDA, EDWARD P. GEBHARDT, JR., FLORIAN J. LIZANA, III, WARREN L. MINTER, DALBERT PERRON, AND KENNETH SMITH, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Petitioners,

vs.

DILLARD DEPARTMENT STORES, INC. AND D.H. HOLMES, LTD.,

Respondents.

Response To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Worker Adjustment and Retaining Act ("WARN"), does "back pay" mean the amount of pay an employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period, or does it mean a penalty of a day's pay for each day of the shortened notice period, regardless of whether the employee would have worked those days?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Dillard Department Stores, Inc. is the parent company of D.H. Holmes Company, Ltd. D.H. Holmes Broadcasting Corp. is a non-wholly owned subsidiary of D.H. Holmes Company, Ltd. Other non-wholly owned subsidiaries of Dillard Department Stores, Inc. include Central Ace Hardware Corp., CDI Contractors, Inc., EBR Associates, ABR Joint Venture, SI Lessors, Ingram Food Court Assoc., and Windsor Park Court Assoc.

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No. 93-1857

In The

Supreme Court of the United States

October Term, 1993

CARPENTERS DISTRICT COURT OF NEW ORLEANS AND VICINITY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 130; AND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 406; ROBERT GRAVES, MARTIN N. LUDWIG, SR., DONALD J. LUDWIG, MELVIN BOE, ALCIDE BOUDREAUX, ALBERT CASTANEDA, EDWARD P. GEBHARDT, JR., FLORIAN J. LIZANA, III, WARREN L. MINTER, DALBERT PERRON, AND KENNETH SMITH, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Petitioners,

vs.

DILLARD DEPARTMENT STORES, INC. AND D.H. HOLMES, LTD.,

Respondents.

Response To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Dillard Department Stores, Inc. ("Dillard's"), and D.H. Holmes, Ltd. ("Holmes"), pray that this Court deny the Petitioner's Writ of Certiorari to the

United States Court of Appeals for the Fifth Circuit on the question presented.

I. STATEMENT OF STATUTE INVOLVED

The question presented for review involves Section 5(a)(1) of the Worker Adjustment and Retraining Notification Act ("WARN") or ("Act"), 29 U.S.C. §2104(a)(1) (1988). Section 2104(a) states that:

(a) Civil Actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for -

(A) back pay for each day of violation at a rate of compensation not less than the higher of -

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; . . .

* * *

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by -

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation;

* * *

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

* * *

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

II. STATEMENT OF THE CASE

In the Fall of 1988, a financially struggling D.H. Holmes Company, Ltd. began buy-out discussions with financially sound Dillard Department Stores, Inc.

Petitioners' Appendix, A-42. Those discussions resulted in their merger on May 9, 1989. A-42, 43. Upon their merger, Dillard's predictably began taking action to restore the old Holmes operations to a financially sound basis. This included the elimination of redundant management and staff corporate positions, the elimination of unneeded warehousing operations, and the closing of Holmes' money-losing flagship store on Canal Street in downtown New Orleans. A-4.

On April 19, 1989, most employees of Holmes' Corporate Division were given notices explaining that they would be terminated effective May 9, 1989, subject to Holmes' stockholders' approval of the merger with Dillard's. A-43. A second notice of termination was sent between April 21 and 28, 1989 to certain "transitional employees" in the Corporate and Warehouse Divisions notifying them that they would be laid off between May 9 and July 1, 1989. A-43. Dillard's distributed a third notice on May 12, 1989 informing employees in the Canal Street store that it would be closed and they would be laid off between June 10 and July 8, 1989. A-43.

All of the employees who were to be laid off did in fact receive a WARN notice. Of those employees who received a WARN notice, a significant number got a full 60 days of notice. Of those employees who did not get a full 60 days' notice, Dillard's calculated and paid to the employees the amount of "back pay" to which they would be entitled had

they received a full 60 days' notice. A-5, 44. (The propriety of certain offsets was litigated below and is not at issue in this Petition. Regardless, all employees who were laid off received either 60 days' notice or an amount of money equal to the amount of "back pay" the employees would have earned had they received the full 60 days' notice.)

Thus, all employees involved in this litigation received WARN notices. Those employees who did not receive a full 60 days of WARN notice were paid "back pay". A-44. The only issue raised in this Petition for Certiorari involves the question of whether an employer must pay an employee who does not receive a full 60 days' notice "back pay", consisting of either (1) the amount of pay the employee would have received had the plant remained open or had the layoff been deferred until the conclusion of the notice period, or (2) whether the employer is required to pay a penalty of one day's pay for each day that the notice was short, regardless of whether the employee would have worked on those days or not.

III. STATEMENT OF DISPUTED FACTS

At Page 4 of the Petitioner's Petition for Writ of Certiorari, under the heading of Statement of the Case, the Petitioners make the following statement: "In deciding who to lay off and when, Dillard's only considered the cost effectiveness of its actions, not the WARN Act or the futures

of the 800 people whose jobs would be cut." Respondent Dillard's vehemently disputes this alleged statement of fact. Dillard's not only considered the WARN Act, but took considerable steps to comply. As set forth above, all employees involved in this litigation received a WARN notice. In addition, many employees received the full 60 days' notice. As to those employees who did not receive a full 60 days, Dillard's made "back pay" payments to the employees. While it is true that Dillard's acted quickly and decisively in order to put the former Holmes operations on a sound financial basis, Dillard's did not do so without consideration of the WARN Act. Indeed, Dillard's took significant steps to comply with the WARN Act, and disputes Petitioner's claim to the contrary.

IV. REASONS FOR DENYING THE WRIT

A. The Supreme Court, twice this year, has denied a Petition For Writ of Certiorari on the very issue presented in the instant Petition for Writ of Certiorari.

In United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc., 5 F.3d 39 (3d Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1060 (1994), reh'g. denied, ___ U.S. ___, 114 S. Ct. 1585 (1994), this Court was presented with the very issue presented in the instant Petition for Writ of Certiorari. The Supreme Court first denied North Star Steel's Petition for Writ of Certiorari

before the Fifth Circuit's decision in the instant case. Subsequently, on a Petition for Rehearing made on the basis of split in circuits, the Supreme Court denied North Star's Petition for Rehearing. This Court has already determined that this issue is not of such significant importance that it warrants this Court's consideration, even given the split in the circuits.

Despite Petitioners' assertions, the resolution of this matter is not critical to the effectuation of the purposes of the WARN Act. Regardless of how this issue is resolved, employers must still give notice to employees and governmental agencies about certain impending layoffs or plant closures. Further, regardless of how this issue is resolved, employees who do not receive notice, or receive notice of less than 60 days, are entitled to "back pay" in lieu of such notice. Consequently, the only issue presented in this Petition is the relatively minor question of how much employees in such circumstances will be paid, not whether they will be paid.

This is a relatively new statute and it is not surprising that the first two Circuit Courts of Appeals to address this issue have created a split of authority. However, as other Circuit Courts of Appeals begin adding their weight to one side or the other, issues of this nature have a way of

resolving themselves amongst the Circuit Courts of Appeals, without the need for the intervention of the Supreme Court. Further, there is clearly nothing to prohibit Congress from stepping in and resolving this matter on its own.

B. The Fifth Circuit's decision is not contrary to the clear meaning of the statute.

When an employer does not give a full 60 days of notice to employees who are about to be laid off, the WARN Act provides that employees must be paid "back pay for each day of violation", and that local governments are entitled to "a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. § 2104(a)(1), (3).

Petitioners would have this Court ignore the distinction between "back pay" for employees and a "civil penalty" for local governments. Instead Petitioners focus their entire argument on the phrase "for each day of violation." According to Petitioners, this language would have no meaning unless it means employees would receive back pay for each day of violation regardless of whether or not the employees would have worked those days. However, Petitioners' logic is flawed, because the language does in fact have meaning. Without this language in the statute, it would be arguable that an employer who gave less than 60 days' notice would be obligated to pay back pay for the full 60 days of notice, rather than paying back pay only for the

period of time that the notice was less than 60 days. This language simply makes clear that the "back pay" that an employer must pay encompasses the amount of time that the notice was less than 60 days.

The more appropriate focus on this issue is the focus on the difference between "back pay" and "penalty". Clearly, Congress used different terms to convey different meanings. "Back pay" is a term of art used to describe a monetary amount of compensation that an employee would have earned during a defined period of time but for some act of an employer. Whether the defined period of time is prospective or retrospective is immaterial to the concept of "back pay". Thus, with regard to WARN, the term "back pay" applies to the period of time that an employee gets less than 60 days' notice of a layoff. The employer's obligation is then to pay "back pay" to the employee for that defined period of time. Congress established in the statute the rate of pay that the employer is obligated to pay. Congress also eliminated some mitigating circumstances which could excuse payment by the employer, such as interim earnings from other employers. However, none of this detracts from the basic meaning of "back pay" to encompass only that amount of money that the employee would have earned had the employer given the employee a full 60 days of notice.

Congress also indicated in the statute that it knew the difference between "back pay" and "penalty". If an

employer fails to give the local government unit 60 days' notice of the layoff or plant closing, the employer is subject to a "civil penalty" of $500 per day for each of the 60 days of violation. 29 U.S.C. § 2104(a)(3). Very clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not. Thus, Congress has clearly established, within the framework of this statute, the difference and the distinction between a penalty and back pay. The term "for each day of violation" is simply used by Congress to define the period of time for which back pay is due. It clearly did not intend to change the meaning of "back pay" by the use of the language in question.

Petitioners also attempt to rely on the Congressional history of the statute to support its argument. However, Petitioners ignored a significant point on which the Fifth Circuit rendered its decision, making clear the intent of the legislation to make employees whole, not penalize employers who give less than 60 days' notice.

Senators Metzenbaum, Kennedy and Simon originally introduced this statute as the Economic Dislocation and Worker Adjustment Assistance Act (S. 538) in 1987. S. Rep. No. 62, 100th Cong., 1st Sess. 14 (1987). Senate majority leader Robert Byrd called up the bill as an Amendment to the Omnibus Trade Act of 1987 ("OTA"). 133 Cong. Rec. S. 9389-90 (Daily Ed. July 8, 1987). After

a presidential veto of the OTA, Senator Metzenbaum reintroduced the plant-closure and mass-layoff provisions as the WARN Act on June 16, 1988. Senator Metzenbaum himself noted that the WARN Act provisions as introduced were identical to the provisions of S. 538 as incorporated into the OTA. 134 Cong. Rec. S. 8375 (Daily Ed. June 22, 1988). The Senate's report, as originally introduced by Senator Metzenbaum, makes clear the make-whole intent of the provision that has become Section 5(a)(1) of the WARN Act:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusions [sic] of the notice period, less any wages or fringe benefits received from the violating employer during that period.

S. Rep. No. 62, 100 Cong., 1st Sess. 24 (1987) (Emphasis added).

Indeed, in defending the current text of Section 5(a)(1) of the WARN Act, in Senate floor debates, Senator Metzenbaum emphasized:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this

> bill is a way of providing additional financial obligations on the part of employers. That is not the object of this bill.

134 Cong. Rec. S. 8542-43 (Daily Ed. June 24, 1988) (Emphasis added).

Without question, the Congressional history points to the fact that when Congress used the term "back pay", it meant that the employees would be made whole for any loss of wages that they may have suffered as a result of an employer laying them off prior to receiving 60 days' notice, and nothing more. Petitioners' assertion to the contrary is simply not supported by the Congressional history nor the language of the statute defining an employer's obligation to an employee as "back pay" rather than a "penalty".

C. Petitioners' claim that the Fifth Circuit's decision is contrary to regulations promulgated under the statute raises issues not before the Court in this case.

Petitioners claim that this Court should grant a Petition for Writ of Certiorari based on the fact that the Fifth Circuit decision is contrary to the final regulations promulgated under the statute. After making this assertion, Petitioners use an example of a seasonal employee who may have been laid off during the summer that the Dillard's/Holmes merger occurred. However, this simply is not the fact situation that is before this Court.

Further, even if this fact situation were before the Court, clearly where a statute and implementing regulations conflict, the statute, not the regulations, prevail. See Board of Governors v. Dimension Financial, 474 U.S. 361, 374 (1986). See also K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). Regulations inconsistent with the statute from which the regulations draw their authority are invalid. Board of Governors, 474 U.S. at 374.

V. CONCLUSION

The Supreme Court has already denied, this year, a Petition for Certiorari, as well as a Petition for Rehearing based on a split in the circuits on this very issue. This is a rather simple issue that the circuits can resolve amongst themselves, or Congress can resolve for them. The decision of the Fifth Circuit Court of Appeals is sound and should not be disturbed. Petitioners' question of whether, under the WARN Act, employees are to be paid the amount of wages they would have earned had they not been laid off prior to receiving a full 60 days' notice or whether they should be paid a day's wages for every day the employee does not receive 60 days' notice, including days the employee would not have worked, is readily and easily answered by the bill's sponsor, Senator Metzenbaum: ". . . damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff been

deferred until the conclusions of the notice period. . .." S. Rep. No. 62, 100 Cong., 1st Sess. 24 (1987).

Respondents respectfully request the Supreme Court deny Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(3)

In the Supreme Court of the United States

OCTOBER TERM, 1994

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 5(a)(1)(A) of the Worker Adjustment and Retraining Notification Act provides that an employer who orders a plant closing or mass layoff in violation of the Act's 60-day notification requirement, 29 U.S.C. 2102, "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). The question presented is whether this provision entitles aggrieved employees to damages for each calendar day of the violation, or only for each work day on which the employees would have earned wages if no violation of the Act had occurred.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1857

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. 2101 *et seq.*, prohibits covered employers, with exceptions not relevant here, from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice" of such action to each representative of affected employees, or, in the absence of such a representative, to each employee. 29 U.S.C. 2102(a)(1). The employer is also required to provide

notice to designated state and local officials. 29 U.S.C. 2102(a)(2). Section 2(a) of the Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines such employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50 percent reduction in work hours for each of six months, 29 U.S.C. 2101(a)(5) and (6).

Section 5(a)(1)(A) of the Act provides that an employer who violates the statutory notice requirement "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). That provision also specifies the "rate of compensation" by which back pay is to be measured as no less than the higher of the employee's "average regular rate * * * during the last 3 years of * * * employment," 29 U.S.C. 2104(a)(1)(A)(i), or the employee's "final regular rate," 29 U.S.C. 2104(a)(1)(A)(ii). Statutory liability extends for a maximum of 60 days, but no more than one-half the number of days for which the aggrieved employee was employed. 29 U.S.C. 2104(a)(1). Section 5(a)(2) provides that a noncomplying employer's liability to an aggrieved employee may be reduced by "wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment" from the employer to the employee that does not result from "any legal obligation." 29 U.S.C. 2104(a)(2)(A) and (B).[1] The WARN Act does not provide,

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[1] In addition, Section 5(a)(1)(B) makes the employer liable to each aggrieved employee for "benefits under an employee benefit plan" that the employee would have received "if the employment

however, for a reduction in damages for wages earned during the violation period from another employer.[2]

2. On May 9, 1989, respondent D.H. Holmes Co., Ltd., which was in poor financial condition, became a wholly owned subsidiary of respondent Dillard Department Stores, Inc., by means of a merger. Pet. 4; Pet. App. A2-A4, A42. That merger resulted in the layoff of approximately 800 Holmes employees between May and August 1989. Pet. 5; Pet. App. A43-A44. Approximately 700 of those employees received less than 60 days' notice of their impending layoff. Pet. 5. Recognizing that it had failed to give sufficient notice under the WARN Act, Dillard purported to comply voluntarily with the Act's damages provision by identifying those employees it believed to be covered by the Act, and paying them for the days they would have worked had it given sufficient notice, minus any outstanding severance or vacation pay. *Ibid.*; Pet. App. A4-A5, A44.

3. Petitioners, a class of former employees who were terminated as a result of the merger and who did not receive the requisite notice, filed suit in federal district court against respondents, several of respondents' individual officers and directors, and their fiduciary liability insurer. Pet. App. A5-A6, A41, A70. On petitioners' motion for partial summary judgment, the magistrate judge determined that respondents' failure to

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loss had not occurred." 29 U.S.C. 2104(a)(1)(B). Correspondingly, Section 5(a)(2)(C) permits a reduction in the amount owed for any payment made by the employer to a third party or trustee "on behalf of and attributable to the employee" for the violation period. 29 U.S.C. 2104(a)(2)(C).

[2] Section 5(a)(3) of the Act also provides for "a civil penalty of not more than $500 for each day of * * * violation" against any employer who fails to give the requisite notice to a unit of local government. 29 U.S.C. 2104(a)(3).

provide the requisite notice violated the Act, as neither of the two statutory exemptions to the Act's notice requirement, see 29 U.S.C. 2103, was applicable. Pet. App. A59. The court concluded that Section 5(a)(1) provides "a penalty for fail[ure] to give adequate notice," *id.* at A61, and that Congress had expressed a "clear" intent under that provision to provide damages for every calendar day within the violation period, *id.* at A63. After a separate trial, see *id.* at A44, the court awarded petitioners $1,262,050.10 in damages, together with pre-judgment interest and attorneys' fees. Pet. 6; Pet. App. A89, A90.

4. The court of appeals reversed in relevant part, holding that Section 5(a)(1) entitles aggrieved employees to damages only for lost work days within the statutory violation period. It acknowledged that the Act is "susceptible to more than one reasonable interpretation," and that its decision conflicts with the Third Circuit's contrary holding in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), that Section 5(a)(1) requires payment for every calendar day within the violation period. Pet. App. A16. The court of appeals, however, placed substantial reliance on decisional law holding that "the term 'back pay' commonly means *pay* * * * that an employee would have earned * * * if the event that affected such job related compensation had not occurred." *Id.* at A16-A17 (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)). The court observed that "[i]f aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred." *Id.* at A17.

In the Fifth Circuit's view, the legislative history also showed that back pay under the Act "connote[s] the traditional back pay remedy as discussed in *Phelps Dodge*." Pet. App. A19. The court relied for this conclusion on the Senate Report accompanying a predecessor version of the Act, which stated that "damages are to be measured by the wages * * * the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period." *Id.* at A20 (quoting S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987)).

DISCUSSION

The decision of the court of appeals is erroneous and conflicts directly with the Third Circuit's resolution of the same question. Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose. The petition for a writ of certiorari should therefore be granted.

1. The court of appeals in this case primarily relied on its perception that "the term 'back pay' commonly means *pay*, *i.e.*, wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred." Pet. App. A16. We acknowledge that the term "back pay," as used in other statutes, typically connotes a remedy based on the wages that an employee would have earned if no violation of law had occurred. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (National Labor Relations Act); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII). In our view, however, three features of the statutory scheme at issue here indicate that a WARN Act damage award was intended to serve significant noncompensatory purposes, and that the

award should be calculated for each calendar day of the violation.

a. The Act provides that an aggrieved employee is entitled to back pay for "each day of violation." 29 U.S.C. 2104(a)(1)(A). Read in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. Thus, the employer is forbidden to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order," 29 U.S.C. 2102(a), and it is undisputed that this provision entitles employees to notice 60 calendar days prior to the plant closing or layoff, without regard to the employees' (potentially varying) work schedules within that 60-day period.[3] Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer.[4] Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

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[3] Indeed, a requirement that notice be given 60 work days prior to a plant closing or mass layoff would substantially expand the employer's obligations under the Act.

[4] Compare also 29 U.S.C. 2104(a)(2)(A) and (C) and the final sentence of 29 U.S.C. 2104(a)(2) (providing for the offset of wages and for health and pension contributions attributable to "the period of the violation").

The Act also provides for a civil penalty, payable to an affected "unit of local government," in an amount not to exceed "$500 for each day of such violation." 29 U.S.C. 2104(a)(3). Respondents acknowledge (Br. in Opp. 10) that, "[v]ery clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not." It is unlikely that the term "each day" was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3).[5] See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the

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[5] The Conference Report states that "if the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). That passage makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given.

The Conference Report initially accompanied H.R. 3, 100th Cong., 1st Sess. (1987), which included plant-closing provisions. H.R. 3 passed the Congress in 1988 but was vetoed by President Reagan. The plant-closing provisions were subsequently passed separately in the WARN Act, Pub. L. No. 100-379, 102 Stat. 890 (1988). Because the WARN Act is "identical to the plant closing provision" included in H.R. 3, see 134 Cong. Rec. 14,983 (1988) (Sen. Metzenbaum), the legislative history of H.R. 3's plant-closing provisions should be treated as the legislative history of the WARN Act. See also Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. No. 100-418, § 2, 102 Stat. 1119 (providing that the legislative history of H.R. 3, including the Conference Report, should be treated as the legislative history of the OTCA).

same meaning.") (citations and internal quotation marks omitted). The court of appeals therefore was mistaken in concluding that application of the Act's back pay provision "requires a calculation using the number of work days in the violation period rather than the number of calendar days." Pet. App. A20.

b. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report states explicitly what is implicit in that statutory text: "[T]he only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

In order to ensure that a backpay award places an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, computation of the award ordinarily entails an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge*, 313 U.S. at 197-198;[6] 5 U.S.C. 5596(b)(1)(A)(i) (federal employee aggrieved by unjustified personnel action is entitled to receive "an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have

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[6] Indeed, in *Phelps Dodge* the Court held that the National Labor Relations Board had erred in deducting only those sums actually earned from other employers, and in failing to deduct additional sums that the employee might have earned through reasonable diligence. 313 U.S. at 197-198. The Court explained that, "[s]ince only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Id.* at 198.

earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period"). The court of appeals recognized that the WARN Act's back pay provision diverges in this significant respect from the method by which back pay is ordinarily computed, see Pet. App. A18-A19 n.14, but in our view the court failed to draw the appropriate inference from that divergence. The absence of an offset for wages earned from another employer demonstrates that a WARN Act damage award is intended to serve substantial noncompensatory purposes—that Congress's intent to deter and punish violations of the Act (and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period) has been given precedence over any desire to ensure that aggrieved employees receive only the same earnings that they would have received had no violation occurred.

c. The legislative history also shows that Congress's purpose went beyond the compensation of affected workers for earnings lost as a result of premature plant closings. An amendment introduced by Senator Quayle would have permitted employers to comply with the Act by giving "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988).[7] In opposing the amendment, Senator Metzenbaum—the Act's principal sponsor—empha-

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[7] Even the Quayle amendment would have provided that the severance pay would be in "an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given," 134 Cong. Rec. 15,926 (1988)—a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

sized that "the bill is about giving notice. It is not a mandatory severance bill." *Id.* at 15,928. Senator Metzenbaum noted that, "[a]s stated by the National Academy of Sciences, * * * it is the notice that is essential to successful worker adjustment programs. It is the notice that gives the employee the chance to make other arrangements." *Ibid.* Senator Metzenbaum made clear, moreover, that payment of the wages that an employee would have earned absent the violation would not be an adequate substitute. Quoting from the report of a task force headed by Secretary of Labor Brock, the Senator explained that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the [job retraining] program's single most important resource." *Ibid.* Congress's rejection of the Quayle amendment signaled its agreement that the WARN Act was intended, first and foremost, to induce employers to provide the notice that would enable workers to obtain job counseling and retraining at a time when the plant was still operational. An award of damages for each calendar day of the violation better effectuates that prophylactic purpose than does the approach adopted by the Fifth Circuit in the instant case.

2. The court of appeals also expressed the view that its reading of the Act was supported by (a) the anomalous results that it believed would be produced by a contrary interpretation, and (b) the Senate Report accompanying a predecessor version of the Act. The court of appeals' reliance on those considerations was misplaced.

a. Under the WARN Act, back pay is to be assessed at a rate not less than the higher of "the average regular rate received by [the] employee during the last 3 years of the employee's employment" or "the final regular rate received by [the] employee." 29 U.S.C. 2104(a)(1)(A)(i)

and (ii). The term "regular rate" derives from the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of the WARN Act comes verbatim from Section 7(*o*)(4) of the FLSA, 29 U.S.C. 207(*o*)(4). See Pet. 19.[8] Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled for work in excess of 40 hours in a work week. See 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing [the employee's] total remuneration for employment * * * in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid," 29 C.F.R. 778.109.

Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an

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[8] Although the WARN Act does not authorize the Secretary of Labor to institute enforcement actions, it directs the Secretary to "prescribe such regulations as may be necessary to carry out" the Act, including, "at a minimum, * * * interpretative regulations" concerning satisfactory service of notice. 29 U.S.C. 2107(a). Pursuant to that authority, the Secretary has promulgated regulations at 20 C.F.R. Pt. 639. When promulgating those regulations, the Secretary expressed his intent to "rely on the definitions found in the FLSA." 54 Fed. Reg. 16,049 (1989). Those regulations do not address the calculation of damages under the WARN Act. Nevertheless, the position of the Secretary set forth in this brief regarding the proper interpretation of the phrase "back pay for each day of violation" is entitled to substantial deference. Cf. *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

employee should be credited in computing his damages for a given day. The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. See Pet. App. A20-A22. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten-hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week. *Ibid.*[9]

The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week. Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to

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[9] The Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), referred to the same hypothetical scenario but declined to determine how those employees' WARN Act awards would be computed. See 5 F.3d at 43 & nn.6-7.

which a full-time employee is entitled, and all full-time (*i.e.*, 40-hour-per-week) employees are treated equivalently regardless of their work schedules. Compare Pet. App. A21-A22 & n.16. Indeed, it appears that this method of computing damage awards was employed in the instant case. See Pet. 20. The court of appeals' limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

b. The court of appeals also placed substantial reliance (see Pet. App. A19-A20) on the Senate Report accompanying a predecessor version of the Act.[10] That report stated:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusion[] of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987).

Although the first sentence of this passage, standing alone, lends support to the conclusion of the court of appeals, the court failed to recognize that other, more

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[10] That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the statute as later enacted. See S. Rep. No. 62, 100th Cong., 1st Sess. 68 (1987).

contemporaneous, aspects of the legislative history point in the opposite direction. The Conference Report, for example, "clarif[ied] that for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." H.R. Conf. Rep. No. 576, *supra*, at 1052.[11] As one of the Act's co-sponsors stated, "[r]emedies for violation are limited to money damages—the equivalent of a day's wages and fringe benefits for each day of violation for each affected employee." 134 Cong. Rec. 15,516 (1988) (Sen. Kennedy); see also *id.* at 17,867 (Rep. McCrery) (employer's liability for "a day's wages for every day of notification not given" not relieved by fulfillment of contractual obligations); *id.* at 16,028 (Sen. Hatch).[12] As discussed above (see pages 9-10, *supra*), moreover, the Act's principal sponsor emphasized that severance payments would not be an acceptable substitute for the notice

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[11] The Conference Report also uses identical language in describing the employer's liability for back pay and for the civil penalty owed to the local government (which concededly is owed for each calendar day of the violation, see page 7, *supra*). Thus, the Conference Report stated that the Senate bill (which the conferees adopted in relevant part) "provides that an employer which violates the notice provisions of [29 U.S.C. 2102] is liable for back pay and a civil fine for 'each day of violation.'" H.R. Conf. Rep. No. 576, *supra*, at 1052.

[12] In discussing the back pay awards possible under the Act, Senator Hatch stated: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour, the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028 (1988). Senator Hatch's calculations assume that back pay under the Act would be awarded for eight hours for each calendar day of the violation (300 workers X 30 days/worker X 8 hours/day X $20/hour equals $1,440,000).

required by the Act, and the rejection of the Quayle amendment suggests that the Senate agreed with that view. The court of appeals therefore erred in concluding that the legislative history, taken as a whole, reflects a congressional determination that "back pay for each day of violation" should be limited to days on which an aggrieved employee would have worked if the violation had not occurred.

3. The question presented in this case warrants review by this Court. As the Fifth Circuit acknowledged, see Pet. App. A16, A20-A21, its decision conflicts directly with that of the Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), which held that, "under the plain language of the statute, a violating employer is liable for 'back pay' for each of the calendar days of the violation." *Id.* at 42. The district courts also disagree as to whether injured employees are entitled under the WARN Act to damages for each calendar day of the violation, or only for lost work days. Compare *Frymire* v. *Ampex Corp.*, 858 F. Supp. 1081, 1084 (D. Colo. 1994) (damages awardable for each calendar day); *Joshlin* v. *Gannett River States Publishing Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993) (same); *Wholesale & Retail Food Distribution Local 63* v. *Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) (same, in dictum) and *United Electrical Workers* v. *Maxim, Inc.*, 5 IER Cas. (BNA) 629, 631-632 (D. Mass. May 15, 1990) (same) with *Washington* v. *Aircap Indus., Inc.*, 860 F. Supp. 307, 311-313 (D.S.C. 1994) (damages not awardable for non-work days) and *Jones* v. *Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (same), amended in part, 753 F. Supp. 218 (E.D. Tenn. 1990).

However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. The significant number of cases addressing this issue since the WARN Act's enactment attests to its importance, and the wide disagreement among the district courts suggests that the question will ultimately require resolution by this Court. Moreover, coupled with the Act's liberal venue provision, which permits a suit in "any district in which the violation is alleged to have occurred, or in which the employer transacts business," 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping.[13]

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[13] For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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